

BRB No. 04-0380 BLA

MARGARET R. EARL, o/b/o and as )  
(Widow of WILLARD L. EARL) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
CONSOLIDATION COAL COMPANY ) DATE ISSUED: 01/18/2005  
 )  
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 Remand-Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Dannette Constatino, lay representative, Morgantown, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (01-BLA-279 and 01-BLA-280) of Administrative Law Judge Robert J. Lesnick on a 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).<sup>1</sup> This case, in its present

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<sup>1</sup> Claimant, Margaret R. Earl, is the widow of the miner, Willard Earl, who died on May 13, 1998. The death certificate lists the cause of death as respiratory arrest secondary to respiratory failure as a consequence of severe COPD, emphysema and black lung disease. Director's Exhibit 12.

posture, is before the Board for a second time. The history of the case follows. Initially, an administrative law judge found that while the x-ray and biopsy evidence was inconclusive for the existence of clinical pursuant to 20 C.F.R. §718.202(a)(1), (2), the medical opinion evidence established that the miner's chronic lung disease was due in part to coal mine dust exposure and thus constituted legal pneumoconiosis. See 20 C.F.R. §§718.202(a)(4); 718.201. Weighing the chest x-rays, biopsy evidence, and medical opinions together, the administrative law judge found that the evidence established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a); see *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge further found that the pneumoconiosis, arising out of coal mine employment, was a substantially contributing cause of the miner's totally disabling respiratory impairment and a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §§718.204(c), 718.205(c)(2). Accordingly, the administrative law judge denied employer's request for modification of the prior award of benefits on the miner's claim and awarded benefits on both the miner's claim and the survivor's claim.<sup>2</sup>

Subsequent to an appeal by employer, the Board vacated the administrative law judge's award of benefits on both the miner's claim and the survivor's claim. *Earl v. Consolidation Coal Co.*, BRB No. 02-0519 BLA (Mar. 25, 2003)(unpub.). Specifically, the Board concluded that the administrative law judge's finding of legal pneumoconiosis was not affirmable as the administrative law judge: did not properly characterize the opinions of Dr. Kleinerman, and did not explain his basis for according superior weight to the medical opinions of Dr. Rasmussen. *Earl*, slip op. at 6-7. Accordingly, the Board remanded the case for further consideration of these physicians' medical opinions. Pursuant to this holding, the Board also vacated the finding of disability causation at Section 718.204(c) and that the finding that the death was due to pneumoconiosis at Section 718.205(c) as these findings were based, in part, on the administrative law judge's flawed analysis of the opinions of Drs. Kleinerman and Rasmussen. *Earl*, slip op. at 7. Accordingly, the Board directed the administrative law judge to also reconsider

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<sup>2</sup> After having two claims previously denied administratively, Director's Exhibit 88, the miner filed a third claim for benefits on April 8, 1994. On May 14, 1997, Administrative Law Judge Frederick D. Neusner issued a Decision and Order awarding benefits on this claim. Upon consideration of employer's appeal, the Board affirmed this award of benefits. *Earl v. Consolidation Coal Co.*, BRB No. 97-1297 BLA (May 22, 1998) (unpub.). Subsequent to the miner's death, claimant on July 28, 1998, filed a survivor's claim. Director's Exhibit 2. On May 7, 1999, employer requested modification of the miner's claim award, arguing that the biopsy results demonstrated that the miner did not have pneumoconiosis. Director's Exhibits 20, 69. Subsequently, the district director denied employer's request for modification of the miner's award and he awarded benefits on the survivor's claim. Director's Exhibits 82-85.

these issues after reassessing the opinions of Drs. Kleinerman and Rasmussen regarding the existence of legal pneumoconiosis. *Id.*

On remand, the administrative law judge again found that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 5-9. The administrative law judge further determined that the weight of the entirety of the relevant evidence established the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 9. Lastly, the administrative law judge again found that the evidence of record established disability causation at Section 718.204(c) and that the miner's death was due to pneumoconiosis at Section 718.205(c). Decision and Order at 8. Accordingly, the administrative law judge denied employer's request for modification of the award of benefits on the miner's claim and he awarded benefits on both the miner's claim and the survivor's claim.

On appeal, employer contends that the administrative law judge again erred in his analysis of the opinions of Drs. Kleinerman and Dr. Rasmussen. Thus, employer contends that the administrative law judge erred in concluding that the miner suffered from legal pneumoconiosis and that such pneumoconiosis contributed to or was a factor in the miner's death. Claimant, through her lay representative, responds, urging affirmance of the awards of benefits on both claims. The Director, Office of Workers' Compensation Programs, declines to participate in this appeal.

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 the 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

There are different elements of proof to establish entitlement on the miner's claim and the survivor's claim. On the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was 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. To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §718.205(a)-(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered 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), (4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal*

Co., 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *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).

On appeal, employer argues that the administrative law judge erred in failing to fully consider the opinions of Dr. Kleinerman as directed by the Board. Employer avers that Dr. Kleinerman's medical findings are more persuasive than those of Dr. Rasmussen and that Dr. Kleinerman, like Dr. Rasmussen, fully understood the miner's complaints about his breathing problems, his smoking history and fully understood the actual duration of the miner's exposure to coal dust. Employer further argues that Dr. Kleinerman grasped the concept of legal pneumoconiosis, having commented on the issue in his deposition. Moreover, employer asserts that in contrast to the administrative law judge's determination, Dr. Kleinerman fully discussed the etiology of the interstitial fibrosis identified in claimant and opined that such fibrosis did not arise from coal mine employment.

We reject employer's assertions regarding Dr. Kleinerman's opinion, however, as they are tantamount to requests that the Board reweigh the evidence of record, which is outside the Board's scope of review. *See Anderson*, 12 BLR at 1-113. When this case was previously before the Board, we instructed the administrative law judge to reconsider the medical opinion of Dr. Kleinerman, Director's Exhibits 69, 72, as the administrative law judge's analysis of the physician's understanding of the length of the miner's exposure to coal dust was inconsistent. *Earl*, slip op. at 6.

On remand, the administrative law judge acknowledged that "both physicians cited a fairly accurate employment history." Decision and Order on Remand at 8. The administrative law judge concluded that Dr. Kleinerman's opinions that the miner did not suffer from legal or clinical pneumoconiosis and that pneumoconiosis played no role in the miner's death were not entitled to great weight because: Dr. Kleinerman's opinion was based primarily on his own negative biopsy interpretation, which was limited to the lower left lung lobe; his finding regarding the relationship between the miner's interstitial fibrosis and coal dust exposure was ambiguous; he relied on, in part, an experimental, unpublished, animal study; the miner's disabling respiratory condition had manifested itself long before he underwent a thoracotomy and many years before his cancer diagnosis. Decision and Order on Remand at 6. Further, the administrative law judge found that Dr. Kleinerman's reliance on the Surgeon General's 1964 report linking obstructive lung disease, lung cancer and smoking did not contradict other medical evidence of record, specifically the opinion of Dr. Rasmussen, that the miner's disabling respiratory impairment and death were due to both smoking and the miner's long history of coal mine dust exposure.

We conclude, therefore, that substantial evidence supports the administrative law judge's findings regarding Dr. Kleinerman's opinions, and we hold that the administrative law judge has complied with the Board's remand instructions and has provided valid bases for according less weight to Dr. Kleinerman's opinion. 20 C.F.R. §718.201; 718.202(a)(4); 718.204(c); 718.205(c); *Compton*, 211 F.3d 203, 22 BLR 2-162; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Turning to Dr. Rasmussen's opinion, employer argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion finding the existence of pneumoconiosis on x-ray inasmuch as it was previously determined that the existence of pneumoconiosis was not established based on x-ray and biopsy pursuant to Section 718.202(a)(1) and (2). Employer contends, therefore, that the credibility of Dr. Rasmussen is at issue. Employer further argues that Dr. Rasmussen's opinion as to the role of pneumoconiosis in the miner's death was equivocal and that the administrative law judge erred in according the opinion greater weight solely based on Dr. Rasmussen's status as the miner's treating physician.

We reject employer's assertions with regard to Dr. Rasmussen as they are tantamount to requests that the Board reweigh evidence, which is outside the Board's scope of review. *See Anderson*, 12 BLR at 1-113. When this case was previously before the Board, the Board instructed the administrative law judge to reconsider the opinions of Dr. Rasmussen and to state his bases for crediting the opinions. *Earl*, slip op. at 7.

The administrative law judge thoroughly reviewed Dr. Rasmussen's opinions, Director's Exhibits 20, 46, 48; Claimant's Exhibit 4, and found that Dr. Rasmussen "set forth clear, coherent and unequivocal findings" regarding the existence of legal pneumoconiosis, disability causation, and the role of pneumoconiosis in the miner's death. Decision and Order on Remand at 8. Contrary to employer's assertion, the administrative law judge concluded that Dr. Rasmussen's examinations of the miner, along with his review of the entirety of other medical data of record, including the opinion of Dr. Kleinerman, and his citation to medical literature relating to human studies enabled Dr. Rasmussen to provide a well-reasoned, well-documented opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We are thus unable to say that the administrative law judge abused his discretion in according greater weight to Dr. Rasmussen's opinions inasmuch as the administrative law judge addressed the Board's concerns and thoroughly discussed the relevant issues presented by the medical evidence. *See Hicks*, at 138 F.3d 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269. Accordingly, we affirm the administrative law

judge's decision to accord greater weight to the opinions of Dr. Rasmussen and thus affirm the administrative law judge's findings that claimant established: the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4); disability causation at Section 718.204(c); and that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). In so doing, we affirm the administrative law judge's rejection of employer's petition for modification of the award of benefits on the miner's claim, and affirm the award of benefits on both the miner's claim and the survivor's claim.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge