

BRB No. 06-0365 BLA

DIANE GOFF, RICHARD HYSLOP, and)
GRAY HYSLOP o/b/o)
BERNICE HYSLOP (Widow of HUGH B.)
HYSLOP))
)
Claimant-Respondent)
)
v.) DATE ISSUED: 01/30/2007
)
OLD BEN COAL COMPANY)
)
and)
)
PEERLESS INSURANCE COMPANY)
)
and)
)
LIBERTY MUTUAL SURETY)
)
Employer/Carrier/Surety-)
Petitioners)
)
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 – Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones and Snelling), Chicago, Illinois, for claimant.

Gary B. Nelson and Cheryl Erdman (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/surety.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H.

Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Old Ben Coal Company, through its surety, Liberty Mutual Surety (employer), appeals the Decision and Order on Remand – Award of Benefits (1996-BLA-1622) of Administrative Law Judge Robert L. Hillyard on a miner's duplicate 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).¹ This case is before the Board for the third time.² Pursuant to employer's prior appeal, the Board vacated Administrative Law Judge Clement J. Kichuk's award of benefits in both the miner's claim and the survivor's claim. The Board held that Administrative Law Judge Donald W. Mosser's finding, rendered in his 2000 Decision and Order, that pneumoconiosis was established pursuant to Section 718.202(a)(2), was not in accord with the United States Court of Appeals for the Seventh Circuit's holding in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), as Judge Mosser did not adequately explain his weighing of the conflicting medical evidence. *Hyslop v. Old Ben Coal Co.*, BRB No. 03-0346 BLA, slip op. at 3-4 (Sept. 30, 2004)(unpub.). Consequently, the Board vacated its prior affirmance of the Section 718.202(a)(2) findings and remanded the case for Judge Kichuk to reconsider the autopsy evidence and provide a more detailed explanation of his weighing of the relevant evidence. *Id.* In addition, Judge Kichuk was instructed that if, on remand, the autopsy evidence failed to establish the existence of pneumoconiosis, then he must consider the remainder of the

¹ Claimants are the adult children of Bernice Hyslop, the widow of Hugh B. Hyslop, the miner, who died on September 3, 1994, and are acting as representatives of the estate. Director's Exhibit 2A.

² The miner's claim was filed on April 26, 1988 and the survivor's claim was filed on January 31, 1995. The complete procedural history of this case was detailed in the Board's two prior decisions, *Hyslop v. Old Ben Coal Co.*, BRB No. 03-0346 BLA (Sept. 30, 2004)(unpub.) and *Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA (Sept. 27, 2000)(unpub.).

evidence to determine whether it establishes the existence of pneumoconiosis pursuant to the other methods set forth at Section 718.202(a). *Hyslop*, slip op. at 4.

With respect to the issue of the cause of the miner's total disability, the Board declined to reconsider its prior rejection of employer's argument that the miner's advanced age and arthritis took him outside of the scope of the Act, holding that the Seventh Circuit has declined to apply the holding in *Peabody Coal Co. v. Vigna*, 2 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), to claims adjudicated under Part 718. *Hyslop*, slip op. at 4; *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). However, the Board vacated Judge Kichuk's finding that the evidence established total disability causation and directed Judge Kichuk to reconsider the relevant evidence in light of the Board's holdings. *Hyslop*, slip op. at 4-8.

The Board also instructed Judge Kichuk to determine whether claimant established a material change in conditions in the miner's duplicate claim and, if so, then instructed him to determine whether claimant established entitlement to benefits on the merits of the miner's claim. *Hyslop*, slip op. at 8. Lastly, the Board vacated Judge Kichuk's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and remanded the case for Judge Kichuk to reexamine the medical opinions and determine whether they were reasoned and documented and to specify the weight he accorded each opinion. *Hyslop*, slip op. at 8-9.

On remand, the case was reassigned to Administrative Law Judge Robert L. Hillyard (the administrative law judge), due to Judge Kichuk's unavailability. In weighing the relevant evidence, the administrative law judge determined that the autopsy evidence supported a finding of pneumoconiosis pursuant to Section 718.202(a)(2). The administrative law judge concluded, therefore, that claimant established a material change in conditions. In addition, the administrative law judge found the evidence sufficient to establish that the miner's total disability, as found by Judge Mosser in his 2000 Decision and Order, was due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge found entitlement established in the miner's claim. With respect to the survivor's claim, the administrative law judge found the medical evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Consequently, the administrative law judge found entitlement established in the survivor's claim. Accordingly the administrative law judge awarded benefits in both the miner's duplicate claim and the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), arguing that the administrative law judge failed to consider all of the relevant medical evidence and did not properly weigh the medical opinions that he addressed. Employer further contends that the administrative law judge erred in finding

the evidence sufficient to establish total disability causation pursuant to Section 718.204(c). In addition, employer again contends that an award of benefits is precluded as the miner was totally disabled by his advanced age and arthritis and, therefore, under *Vigna*, this claim is not under the purview of the Act. In support of this argument, employer maintains that the Seventh Circuit's holding in *Gulley v. Director, OWCP*, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005), indicates that *Vigna* applies to Part 718 claims. Lastly, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis.

In response, claimant agrees with employer that the administrative law judge erred in failing to consider all of the relevant medical opinions at Section 718.202(a)(2) and, therefore, that the case needs to be remanded for further consideration of the evidence. In addition, claimant contends that in light of the need to vacate the administrative law judge's Section 718.202(a) findings, the Section 718.204(c) and Section 718.205(c) findings also need to be vacated as they were premised on the administrative law judge's Section 718.202(a)(2) findings. However, claimant urges the Board to reject employer's argument that entitlement is precluded as a matter of law under *Vigna*. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the miner is not entitled to benefits because of his advanced age and disabling arthritis. The Director contends that this issue is governed by law of the case, as the Board addressed employer's argument in the 2001 Decision and Order on Reconsideration, *see Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA (Apr. 24, 2001)(Decision and Order on Reconsideration)(unpub.), and, therefore, the issue should not be revisited. In addition, the Director contends that even under the Seventh Circuit's holding in *Gulley*, an award of benefits is not precluded.

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

The Miner's Claim

In challenging the administrative law judge's Section 718.202(a)(2) findings, employer argues that the administrative law judge failed to consider all of the relevant evidence. Specifically, employer contends that the administrative law judge considered only those opinions provided by pathologists and the Department of Labor expert, Dr. Long, and did not consider the reports of the remainder of the physicians, which included reviews of the autopsy evidence. Employer's Brief at 9-10. In addition, employer contends that the administrative law judge erred in discrediting Dr. Naeye's opinion, arguing that the administrative law judge misinterpreted Dr. Naeye's report and

testimony regarding the presence of anthracosis. Employer's Brief at 12-16. In addition, employer contends that the administrative law judge erred in crediting the opinion of Dr. Heidingsfelder, merely because he was the autopsy prosector, in contravention of *McCandless*. Employer's Brief at 16. Employer also contends that the administrative law judge erred in failing to acknowledge the qualifications of the physicians providing assessments. Employer's Brief at 17.

In response to employer's appeal, claimant agrees with employer that the administrative law judge erred in failing to weigh all of the relevant evidence. Claimant's Brief at 5. Consequently, claimant also contends that the case must be remanded to the administrative law judge for consideration of all of the relevant evidence. *Id.*

In light of the parties' agreement that the administrative law judge failed to consider all of the evidence relevant to Section 718.202(a)(2) and their request that the case be remanded to the administrative law judge, we vacate both the administrative law judge's finding that pneumoconiosis was established under Section 718.202(a)(2) and his finding of a material change in conditions. The case is remanded to the administrative law judge for further consideration of the evidence of record. On remand, the administrative law judge must discuss all of the medical opinions of record relevant to a finding of the existence of pneumoconiosis based on the autopsy evidence. Specifically, the administrative law judge must determine whether the additional medical opinions are based on the types of documentation required under Section 718.202(a)(2) and 20 C.F.R. §718.106, and, then, determine whether the weight of the evidence is sufficient to establish the existence of pneumoconiosis. 20 C.F.R. §§718.106, 718.202(a)(2). In addition, on remand, the administrative law judge must fully discuss his weighing of the medical opinions of record regarding the results of the miner's autopsy, particularly the opinions of Drs. Crouch and Long, and the extent to which the consultative opinions of record are supported by the type of objective evidence referenced in Sections 718.202(a)(2) and 718.106.

The administrative law judge must also reconsider his determination that Dr. Heidingsfelder's opinion is entitled to greater weight because he performed both a macroscopic and microscopic examination on autopsy. 2005 Decision and Order at 6-7. This rationale is not valid unless it is accompanied by an explanation of why Dr. Heidingsfelder had an advantage over the physicians who reviewed the report of his findings upon macroscopic and microscopic examination. *See McCandless*, 255 F.3d 465, 22 BLR 2-311. In addition, the administrative law judge must set forth in more detail his finding that Dr. Naeye's opinion is vague and inconsistent. The administrative law judge determined correctly that Dr. Naeye used the terms "anthracosis" and "black pigmentation" in his report. 2005 Decision and Order at 6; Employer's Exhibit 18. However, the administrative law judge did not address the fact that Dr. Naeye indicated

that the autopsy findings were not consistent with pneumoconiosis nor did he consider whether Dr. Naeye's diagnosis of anthracosis could support a finding of pneumoconiosis as defined in Section 718.201(a)(1) despite Dr. Naeye's conclusion to the contrary. 2005 Decision and Order at 6; Employer's Exhibit 18 at 8, 10, 19, 33-37, 41-45. Lastly, if, on remand, the administrative law judge finds that the existence of pneumoconiosis is not established under Section 718.202(a)(2) by the autopsy evidence, he must re-evaluate the evidence to determine whether it is sufficient to establish the existence of pneumoconiosis pursuant to any of the other methods provided under 20 C.F.R. §718.202(a).

With regard to disability causation, employer again contends that entitlement in the miner's case is precluded because the miner was totally disabled by non-pulmonary conditions, *i.e.*, his advanced age and arthritis, and, thus, under *Vigna*, entitlement is precluded. In the present appeal, employer contends that, contrary to the Board's prior holding, *see Hyslop*, BRB No. 03-0346 BLA, slip op. at 4, *Vigna* applies to Part 718 claims, citing *Gulley*, 397 F.3d 535, 23 BLR 2-242 and, therefore, argues that the Board's prior holdings to the contrary must be reversed. Employer's Brief at 20-22. In response to this argument, claimant and the Director urge the Board to reject employer's argument as having been previously addressed by the Board.

We decline employer's request to alter our prior holding on this issue. As the Board held in its 2001 Decision and Order on Reconsideration, the record is devoid of evidence establishing that the miner was totally disabled by a non-pulmonary condition, because no physician opined that the miner's age or arthritis caused him to be totally disabled prior to his becoming totally disabled by a pulmonary condition. *Hyslop*, BRB No. 99-0710 BLA, slip op. at 3 (Apr 24, 2001). Thus, the facts of this case do not support a determination that claimant is precluded from entitlement under any of the holdings of the Seventh Circuit regarding disability causation. *Gulley*, 397 F.3d 535, 23 BLR 2-242; *Shores*, 358 F.3d 486, 23 BLR 2-18; *Vigna*, 2 F.3d 1388, 18 BLR 2-215. We reaffirm, therefore, our prior disposition of this issue. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

Nevertheless, we must vacate the administrative law judge's disability causation findings, as the administrative law judge's weighing of the medical evidence under Section 718.204(c) was premised on his Section 718.202(a)(2) findings, which the Board has vacated. *See discussion, supra*. On remand, the administrative law judge must reassess the medical opinions to determine whether they establish that the miner's disability was due to pneumoconiosis. The administrative law judge must determine whether each medical opinion is documented and well-reasoned, and specifically explain his conclusions.

Survivor's Claim

Pursuant to Section 718.205(c), the administrative law judge found that the medical evidence was sufficient to establish that the miner's death was due to pneumoconiosis. Specifically, the administrative law found the opinions of Drs. Long, Murthy and Cohen to be well-reasoned and documented and, thus, supportive of a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). 2005 Decision and Order at 12-15.

On appeal, employer contends that, to the extent that the administrative law judge's finding as to the cause of the miner's death was based on his finding of pneumoconiosis, his Section 718.205(c) finding is also erroneous. Claimant concurs with employer's position. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, and the administrative law judge relied upon this finding when weighing the evidence under Section 718.205(c), we vacate his determination that the miner's death was due to pneumoconiosis. On remand, the administrative law judge must consider each of the medical opinions relevant to this issue, determine whether it is well-reasoned and documented, and provide a detailed rationale for his findings. *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge