

BRB No. 89-0641 BLA

VERONICA SIMONETTI)
(Widow of BIAGIO SIMONETTI))
)
Claimant-Respondent)
)
v.)
)
BCNR MINING CORPORATION) DATE ISSUED:
)
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 of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Grigsby, Gaca & Davies, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (87-BLA-3822) of Administrative Law Judge Charles P. Rippey awarding 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). The administrative law judge reviewed these claims pursuant to the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

provisions of 20 C.F.R. Part 718, and credited the miner with forty-three years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and (a)(4), and 718.203(b) on the miner's claim. The administrative law judge further found that the evidence established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) on the survivor's claim, and thus benefits were awarded on both claims.¹ Employer appeals, contending that the administrative law judge's Decision and Order does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). Specifically with respect to the claim filed by the miner, employer contends that the administrative law judge failed to render findings on the issues of total disability and causation. 20 C.F.R. §718.204(b) and (c). Employer

¹ The administrative law judge did not specifically cite the regulations at Sections 718.202(a)(1) and (a)(4), 718.203(b), or 718.205(c), but the appropriate sections may be inferred from the administrative law judge's findings. See generally Wetzel v. Director, OWCP, 8 BLR 1-139, 1-140 (1985).

further challenges the administrative law judge's findings under Section 718.205(c) on the survivor's claim. Claimant and the Director, Office of Workers' Compensation Programs, have not participated in this appeal.²

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 by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

² The administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.203(b), and with regard to length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Turning first to the miner's claim, employer contends that the administrative law judge erred in failing to address and weigh all relevant evidence on the issues of total disability and causation pursuant to Section 718.204, and in failing to render findings of fact and conclusions of law as required by the APA.³ We agree. See Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's award of benefits on the claim filed by the miner and remand that case for the administrative law judge to consider all relevant evidence of record and determine whether claimant has established total disability pursuant to Section 718.204(c). See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986). If on remand the administrative law judge finds total disability established pursuant to Section 718.204(c), he must then determine whether this total disability is due to pneumoconiosis pursuant to Section 718.204(b). See Bonessa v. United States

³ Employer also maintains that the administrative law judge inadequately reviewed the x-ray evidence of record pursuant to Section 718.202(a)(1). Employer, however, has not challenged the administrative law judge's finding, which is supported by substantial evidence, that the medical opinions of record establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), an alternative method, see generally Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985), thus any error is harmless. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

Steel Corp., 884 F.2d 716, 13 BLR 2-23, 2-27 (3d Cir. 1989).

Turning next to the survivor's claim, employer contends that, in finding that pneumoconiosis was a substantial contributory factor in the miner's death pursuant to Section 718.205(c), the administrative law judge performed a cursory review of the conflicting medical opinions and misconstrued evidence relevant to this issue. Specifically, employer maintains that the administrative law judge mischaracterized the opinion of Dr. Naeye, thus requiring reconsideration thereof on remand. See Tackett v. Director, OWCP, 7 BLR 1-703 (1985). We agree. The administrative law judge found that the conclusion of Dr. Naeye, that the miner's death was apparently due to the complications of arteriosclerosis, did not affirmatively preclude the possibility that pneumoconiosis was a contributing cause in his death. Decision and Order at 3. Dr. Naeye explicitly stated, however, that the miner's coal workers' pneumoconiosis was too mild to have contributed to his death. Director's Exhibit 7. Additionally, the remainder of the administrative law judge's analysis of the opinions of Drs. Fisher, Naeye and Wald⁴ was limited to the physicians' findings concerning

⁴ Contrary to employer's arguments, the administrative law judge provided a valid reason for according less weight to the opinion of Dr. Wald with respect to the cause of death pursuant to Section 718.205(c), i.e., Dr. Wald did not examine the autopsy slides. See Decision and Order at 3. We agree, however, with employer's contention that the administrative law judge mischaracterized Dr. Wald's opinion concerning the miner's impairment by stating that "[i]t is mere speculation to presume what Dr. Wald's opinion would have been had he known that the miner suffered from pneumoconiosis." A review of the record indicates that Dr. Wald diagnosed pneumoconiosis by x-ray. See Director's Exhibit 23.

whether the miner suffered from a pulmonary impairment, rather than the cause of death. See Decision and Order at 3. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.205(c), and remand this case for the administrative law judge to reassess these medical opinions and to reweigh all of the evidence of record relevant to the cause of death thereunder.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge