

BRB No. 91-1509 BLA

TONA MOORE ROSE)
(Widow of BERT ROSE))
)
Claimant-Respondent)
)
v.)
)
ELKINS ENERGY 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 and the Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: BROWN and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Remand (84-BLA-4385) of Administrative Law Judge Charles P. Rippey awarding benefits on both 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

*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).

U.S.C. §901 et seq. (the Act). This case is on appeal before the Board for the second time. In his original Decision and Order, the administrative law judge reviewed these claims pursuant to the provisions of 20 C.F.R. Part 718, and credited the miner with more than fifteen years of qualifying coal mine employment. The administrative law judge found that the miner was entitled to the Section 411(c)(4) presumption of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, and further found that the evidence of record was insufficient to establish rebuttal of that presumption. Consequently, benefits were awarded. On appeal, the Board affirmed the administrative law judge's finding that the autopsy evidence of record established the existence of pneumoconiosis, but vacated the administrative law judge's finding that both invocation and rebuttal had been established pursuant to Section 718.305. The Board remanded this case for the administrative law judge to fully comply with the provisions 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). On remand, the administrative law judge was to determine whether the medical evidence of record in conjunction with the lay evidence was sufficient to establish invocation of the presumption at Section 718.305, and if so, to determine whether employer had established rebuttal of that

presumption. Rose v. Elkins Energy Corp., BRB No. 87-565 BLA (Dec. 19, 1990)(unpublished). On remand, the administrative law judge again found the evidence sufficient to establish invocation but not sufficient to rebut the presumption pursuant to Section 718.305. Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's invocation and rebuttal findings pursuant to Section 718.305. Claimant and the Director, Office of Workers' Compensation Programs, have not participated 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 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).

Employer first contends that in finding invocation established pursuant to Section 718.305, the administrative law judge failed to comply with the requirements of the APA and the Board's previous instructions to address all relevant medical evidence of record. We agree. The administrative law judge found that the uncontradicted medical evidence of record established that the miner suffered for more than one year prior to his death with lung cancer and that the lung cancer was the immediate cause of death. The administrative law judge further concluded that the miner was totally disabled by his lung cancer prior to his death. Decision and

Order on Remand at 2. The administrative law judge, however, did not identify the evidence upon which he based his finding that the miner's lung cancer constituted a totally disabling respiratory impairment which entitled claimant to the Section 411(c)(4) presumption.¹ Decision and Order on Remand at 2. Consequently, we must vacate the administrative law judge's finding that claimant established invocation of the presumption at Section 718.305, and remand this case for the administrative law judge to address all relevant evidence thereunder and render further findings which comport with the requirements of the APA.

¹ We reject employer's argument that in order to establish invocation at Section 718.305, claimant is required to establish that the miner's totally disabling respiratory impairment is chronic or that it arose out of coal mine employment; rather, the inquiry is concerned with the severity of the respiratory impairment irrespective of its cause. Tanner v. Freeman United Coal Co., 10 BLR 1-85 (1987).

Employer also contends that the administrative law judge either mischaracterized or failed to weigh all of the evidence of record relevant to rebuttal at Section 718.305(d). The administrative law judge acknowledged that the uncontradicted evidence of record established that the miner's pneumoconiosis was not totally disabling, but found that the medical opinions made no statement regarding whether the miner's pneumoconiosis caused any pulmonary impairment. Decision and Order on Remand at 2. A review of the record, however, reveals that the opinion of Dr. Dahhan, who determined that the miner's occupational pneumoconiosis had not resulted in respiratory symptoms or disability, and that there was no cause and effect relationship between coal mine employment and the miner's terminal bronchogenic carcinoma, is sufficient to establish rebuttal at Section 718.305(d), if fully credited. Employer's Exhibit 4; see Alexander v. Island Creek Coal Co., 12 BLR 1-44 (1988). Additionally, in concluding that the miner's pulmonary disability arose from a combination of lung cancer and pneumoconiosis based on the inference that since the miner suffered from severe pneumoconiosis, he had some degree of pulmonary disability therefrom, the administrative law judge appears to have impermissibly substituted his own expertise for that of a qualified physician.² Decision and Order on Remand at 3; see Marcum v. Director, OWCP,

² The administrative law judge based his finding that the miner suffered severe pneumoconiosis on Dr. Buddington's review of the autopsy protocol and ten slides, reporting macules measuring up to 5 mm. in diameter. Claimant's Exhibit 2. The administrative law judge determined that the pathological findings of Dr. Shah, the autopsy prosector, were less severe as he reported macules of only up to .3 cm.,

11 BLR 1-23 (1987). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.305(d), and on remand, the administrative law judge should reconsider all of the evidence of record relevant to rebuttal thereunder, in full compliance with our previous instructions on remand and the requirements of the APA.

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

SO ORDERED.

JAMES F. BROWN

thereby creating a reasonable doubt regarding the correct interpretation of the autopsy evidence. Decision and Order on Remand at 2, 3. Contrary to the administrative law judge's findings, however, Dr. Shah reported macules measuring from .1 to .8 cm., Director's Exhibit 7, and Dr. Buddington stated that he was in essential agreement with Dr. Shah's findings. Director's Exhibit 12. Moreover, the administrative law judge failed to determine whether the opinions of Drs. Buddington and Shah were equally probative, nor did he address the findings of Drs. Stefanini, Hansbarger, Harrison or Caffrey, who also reviewed the autopsy protocol and slides. Director's Exhibit 8; Claimant's Exhibit 1; Employer's Exhibits 1, 2.

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge