

BRB No. 02-0620 BLA

SHIRLEY SPARKS)
(Widow of WILLARD SPARKS))
)
 Claimant-Respondent)

v.)
)

BILL BRANCH COAL CORPORATION)
07/30/2003)

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 on Second Remand - Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Second Remand (97-BLA-1763) of Administrative Law Judge Anne Beytin Torkington awarding benefits on a survivor=s claim¹

¹ Claimant, Shirley Sparks, is the widow of Willard Sparks, the miner, who died on August 6, 1990. Director=s Exhibit 9. Claimant filed her application for benefits on November 16, 1990. Director=s Exhibit 1.

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).² This case has been before the Board numerous times. Initially, Administrative Law Judge Reno E. Bonfanti issued a Decision and Order on February 25, 1994 finding that the miner=s death was due to pneumoconiosis and awarding benefits. Judge Bonfanti subsequently amended his decision to modify the effective date of the award of benefits. The Board affirmed Judge Bonfanti=s finding that the miner=s death was due to pneumoconiosis and affirmed the award of benefits in *Sparks v. Bill Branch Coal Corp.*, BRB No. 98-0478 BLA (Aug. 30, 1995)(unpub.). After filing a request for reconsideration with the Board, employer informed the Board that it had filed a request for modification with the district director and requested the Board to remand the case to the district director for modification proceedings. The Board granted employer=s request and remanded the case to the district director in *Sparks v. Bill Branch Coal Corp.*, BRB No. 95-0478 BLA (Feb. 8, 1996)(unpub.). After the district director denied the claim on June 20, 1997, the case was reassigned to Administrative Law Judge Anne Beytin Torkington who issued a Decision and Order denying employer=s request for modification on April 3, 1998. On April 29, 1998, employer appealed Judge Torkington=s award of benefits to the Board and also requested that the Board reinstate its previous request for reconsideration. The Board granted employer=s requests, reinstated employer=s prior request for reconsideration and consolidated it with employer=s most recent appeal. The Board granted employer=s request for reconsideration of the 1995 appeal, but denied the relief requested. The Board again affirmed Judge Torkington=s award of benefits, holding that Judge Torkington properly accorded greater weight to the medical opinion of Dr. Stefanini than to the contrary opinions of record, based on her status as the autopsy prosector because she had relied at least in part on a gross examination in addition to microscopic slides. The Board also affirmed Judge Torkington=s finding that the evidence was insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. ' 725.310 (2000). Employer appealed the award of benefits to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit concluded that the administrative law judges failed to explain adequately their reasoning for crediting some medical evidence over other medical evidence and relied on evidence that was insufficient to support the award of benefits. Accordingly, the Fourth Circuit vacated the award and remanded the case so that the administrative law judge could engage in a fresh review of the relevant evidence and provide reasoning for her ultimate factual findings. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 21 BLR 2-251 (4th Cir. 2000). The Fourth Circuit specifically held that it was troubled by Judge Torkington=s decision to credit Dr. Stefanini=s opinion to the exclusion of all other experts apparently solely because Dr. Stefanini had physically examined the miner=s whole body at the time of death, citing its holdings in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323,

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

2-335 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997). In addition, the Fourth Circuit held that the death certificate and the autopsy report in this case, without additional support or explanation, failed to provide a basis upon which to sustain a finding that the miner=s pneumoconiosis hastened his death. By Order dated July 28, 2000, the Board remanded the case to the Office of Administrative Law Judges for further proceedings consistent with the opinion of the Fourth Circuit. On remand, Judge Torkington awarded benefits, again finding that the miner=s death was due to pneumoconiosis based on the opinion of Dr. Jones, which she found more persuasive than the opinions of Drs. Lane, Hansbarger, Anderson, Caffrey, Kleinerman, and Naeye. Employer appealed the award to the Board contending that the administrative law judge failed to provide sufficient discussion or rationale for her finding concerning the weight accorded to the medical opinion evidence. The Board agreed with employer, and vacated Judge Torkington=s decision awarding benefits and remanded the case for Judge Torkington to evaluate the medical opinion evidence and to review the record in accordance with the case law articulated by the Fourth Circuit, *citing Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 23 (4th Cir. 1997).

On remand, after examining each medical report to determine whether it was documented, reasoned, and rendered by a board-certified physician, the administrative law judge again concluded that claimant established that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205 based upon the opinion of Dr. Jones. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205 based on the sole opinion of Dr. Jones, which was unreasoned, despite the contrary, reasoned opinions of Drs. Fino, Naeye, Lane, Hansbarger, Anderson, Caffrey, Kleinerman. Consequently, employer requests that the Board reverse the administrative law judge=s award of benefits or vacate the administrative law judge=s decision and remand this case for further consideration. In addition, employer requests that the case be reassigned to another administrative law judge if the Board remands the case for further consideration, in light of the administrative law judge=s failure to comply with previous instructions by the Board and the Fourth Circuit. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers= Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not 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 applicable law, they are binding upon the 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).

Specifically, employer contends that the administrative law judge erred in finding the opinion of Dr. Jones to be reasoned inasmuch as Dr. Jones relied on a diagnosis of complicated pneumoconiosis which was not supported by the record to conclude that the miner had a severe and disabling respiratory impairment which hastened his death. Employer also contends that the administrative law judge erred in concluding that the qualifications of Dr. Jones were equivalent to those of Drs. Kleinerman, Hansbarger, Naeye, Lane, Caffrey, Fino, Anderson, and Castle in weighing their opinions inasmuch as the administrative law judge recognized that Dr. Jones lacked an understanding of the ILO Classification System.[@] Decision and Order on Second Remand at 11.

In considering the qualifications of the physicians, the administrative law judge stated:

All of these physicians hold board-certifications. While Dr. Jones faltered on his understanding of the ILO Classification System applying to x-rays alone, I do not find any significant difference in the physicians's qualifications.

Decision and Order on Second Remand at 11. The administrative law judge did not, however, consider the various additional qualifications of the physicians when concluding that there was no significant difference in their qualifications.³

³ The record contains evidence showing that Dr. Jones was Board-certified in anatomical and clinical pathology, was Board-certified in forensic pathology, had been Laboratory Director of the Department of Pathology at LaPorte Hospital, Laporte, Indiana, had been Chairman and Associate Professor/Laboratory Director at Meharry Medical College/Hubbard Hospital, Nashville, Tennessee, and had been a Clinical Assistant Professor of Pathology at Illinois University Medical School. The record also contains evidence showing that: Dr. Kleinerman was Director of Pathology at Case Western Reserve University School of Medicine and had extensive involvement in establishing pathology criteria for diagnosing complicated pneumoconiosis; Dr. Castle was a specialist in pulmonary diseases, Board-certified in internal and pulmonary medicine, and a B-reader; Dr. Anderson, in addition to being Board-certified in internal and pulmonary medicine, was Chief of the Section of Respiratory and Environmental Medicine at the University of Louisville School of Medicine; Dr. Fino was an Assistant Clinical Professor of Medicine in the Division of Pulmonary Disease at the University of Pittsburgh, in addition to being Board-certified in internal and pulmonary medicine and a B-reader; Dr. Caffrey, in addition to being Board-certified in anatomical and clinical pathology, was former Chairman of the Department of Pathology at Central Baptist Hospital; Dr. Lane, in addition to being Board-certified in Internal Medicine was an Associate Professor of Medicine at the University of Louisville School of Medicine; Dr. Naeye, was a renowned Board-certified pathologist, and Chairman of the Pathology Department at Pennsylvania State University College of Medicine; and Dr. Hansbarger, who was Board-certified in anatomic and clinical pathology, was the Director of Laboratories of St. Francis Hospital, in Charleston, West Virginia. *See* Director's Exhibits

The Fourth Circuit has held, that Aexperts= respective qualifications are important indicators of the reliability of their opinions,@ *Hicks*, 138 F.3d at 537, 21 BLR at 2-341; *Akers*, 131 F.3d at 440, 21 BLR at 2-275; see *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). The administrative law judge erred, therefore, in failing to consider the various qualifications of the physicians when he considered their opinions. See *Hicks*, 138 F.3d at 537, 21 BLR at 2-34; see also *Worhach*, 17 BLR at 1-108.

Moreover, in according greater weight to the opinion of Dr. Jones, the administrative law judge relied on the fact that Dr. Jones believed that the miner had complicated pneumoconiosis which led to a severe respiratory impairment contributing to death. The evidence of record and the undisputed determination of the administrative law judge in this case, however, clearly shows that the miner=s pneumoconiosis was simple. The basis for the administrative law judge=s reliance on Dr. Jones=s opinion is, therefore, as employer contends, faulty. Accordingly, the opinion of Dr. Jones does not constitute substantial evidence on which to base a finding of entitlement to benefits and the administrative law judge erred in relying on it. Claimant has failed, therefore, to carry his burden of proof and, as employer contends, the administrative law judge has, in effect, improperly shifted the burden of proof in this case to require employer to prove that claimant=s death was not due to pneumoconiosis. See 20 C.F.R. ' 718.205(c); *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-648 (4th Cir. 1999)(to prove by a preponderance of the evidence each element of a claim before an administrative agency, the claimant must present reliable, probative, and substantial evidence of such sufficient quality that a reasonable ALJ could conclude that the existence of the facts supporting the claim are more probable than their nonexistence); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), cert. denied, 506 U.S. 1050 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Accordingly, because the administrative law judge found that claimant established that the miner=s death was due to pneumoconiosis based solely on the opinion of Dr. Jones which is not supported by the record and, in view of the fact that there is no other evidence of record which would suggest such a finding, the administrative law judge=s Decision and Order on Second Remand awarding benefits must be reversed.⁴

Accordingly, the Decision and Order on Second Remand B Awarding Benefits of the administrative law judge is reversed.

SO ORDERED.

⁴ Our holding that claimant has failed to satisfy her burden of establishing death due to pneumoconiosis obviates the need to address employer=s arguments regarding the administrative law judge=s treatment of the remaining physicians= opinions. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), cert. denied, 506 U.S. 1050 (1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

I concur in the result only, in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

REGINA C. McGRANERY
Administrative Appeals Judge