

BRB No. 03-0671 BLA

BLACHE CASTLE)	
(Widow of BOBBY CASTLE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JOCKEY HOLLOW COAL COMPANY)	DATE ISSUED: 07/01/2004
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (Howard Radzely, Solicitor of Labor; Donald S. Shire, 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.

DOLDER, Chief Administrative Appeals Judge:

Claimant¹ appeals the Decision and Order (02-BLA-0324) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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).² This case involves a survivor's claim filed on April 7, 2000. Director's Exhibit 1. The district director denied the survivor's claim on June 16, 2000.³ Director's Exhibit 15. Claimant subsequently submitted correspondence that the district director construed as a request for modification of the prior denial. Director's Exhibits 16, 26. In a Proposed Decision and Order dated October 30, 2000, the district director denied claimant's request for modification. Director's Exhibit 28. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 35. However, by Order dated April 6, 2001, Administrative Law Judge Daniel J. Roketenetz remanded the case to the district director for further development of the evidence. Director's Exhibit 37.

After further development of the evidence, the district director denied benefits on January 16, 2002 and, at claimant's request, the case was forward to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 37, 38. Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) held a hearing on October 8, 2002.

In his Decision and Order dated June 23, 2003, the administrative law judge addressed claimant's request for modification of the district director's June 16, 2000 denial of benefits. After finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, however, found that

¹ Claimant is the surviving spouse of the deceased miner who died on March 13, 2000. Director's Exhibit 10.

² The Department of Labor (DOL) 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.

³ The district director found that the evidence was insufficient to establish (1) the existence of pneumoconiosis; (2) that the disease was caused at least in part by coal mine work; and (3) that the disease caused the miner's death. Director's Exhibit 15.

the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant also challenges the Department of Labor's denial of the miner's 1978 claim. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Program, has filed a limited response brief, arguing that the denial of the miner's 1978 claim has become final.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant challenges the Department of Labor's denial of the miner's 1978 claim. Although the miner previously filed claims in 1978 and 1993, each of these claims has been finally denied and is, therefore, administratively closed.⁴ The time during which claimant, or the miner, could have challenged the denials of these claims has passed. See *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988). Consequently, the administrative law judge properly found that the miner's claims were not properly before him. Decision and Order at 9.

In regard to the survivor's claim, we initially note that the administrative law judge was not required to consider whether the evidence was sufficient to establish modification of the district director's denial of the survivor's claim. In interpreting 20 C.F.R. §725.310 (2000), the Board has held that an administrative law judge is not required to make a preliminary determination regarding whether a claimant has

⁴ The miner initially filed a claim for benefits on October 25, 1978. Director's Exhibit 34-659. In a Decision and Order dated January 18, 1990, Administrative Law Judge Bernard J. Gilday, Jr. denied benefits. Director's Exhibit 34-255. By Decision and Order dated January 21, 1992, the Board affirmed Judge Gilday's denial of benefits. *Castle v. Jack Price, T/A Isle Coal Inc. &/or Jockey Hollow Coal Co.*, BRB No. 90-0381 BLA (Jan. 21, 1992) (unpublished); see also Director's Exhibit 34-226. There is no indication that the miner took any further action in regard to his 1978 claim.

The miner filed a second claim on September 20, 1993. Director's Exhibit 34-920. In a Decision and Order dated September 8, 1995, Administrative Law Judge Paul H. Teitler denied benefits. Director's Exhibit 34-923. There is no indication that the miner took any further action in regard to his 1993 claim.

established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Rather, the Board has recognized that such a determination is subsumed into the administrative law judge's decision on the merits. The Board has held that an administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). The administrative law judge, therefore, was authorized to address the merits of claimant's survivor's claim without first addressing whether the evidence was sufficient to establish modification of the district director's denial of the claim.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ Claimant specifically argues that the administrative law judge erred in finding Dr. Jurich's opinion insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Dr. Jurich, the miner's treating physician from June 10, 1985 to April 14, 1998, provided deposition testimony on July 11, 2001. Director's Exhibit 37 at 4-5. During his deposition, the following exchange took place:

[Claimant's Counsel]: Okay what was the cause or causes of [the miner's] death?

[Dr. Jurich]: I last saw [the miner] on [April 14, 1998]. I understand that he died on [March 13, 2000]. I don't know really what the final cause was.

[Claimant's Counsel]: Do you know whether his [chronic obstructive pulmonary disease] caused or contributed to cause or hasten his death?

⁵ Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

[Dr. Jurich]: [The miner's chronic obstructive pulmonary disease] was so severe, unless, assuming he died from medical causes, that if he was run over by a truck and that caused his death that [chronic obstructive pulmonary disease] would not have contributed then, but assuming he died from medical causes, I would say his [chronic obstructive pulmonary disease] contributed to his death, no matter what the cause was.

Director's Exhibit 37 at 12.

On cross-examination, Dr. Jurich conceded that he could not render an opinion as to the miner's immediate cause of death. Director's Exhibit 37 at 16.

After reviewing Dr. Vuskovich's September 21, 2002 report, Dr. Jurich prepared a November 2, 2002 report, wherein he concluded that the miner's "severe respiratory problems contributed significantly to his poor health." Claimant's Exhibit 2. Dr. Jurich opined that the miner died of "natural causes with severe respiratory problems being a contributing factor." *Id.*

The administrative law judge acted within his discretion in according less weight to Dr. Jurich's opinion because the doctor conceded that he was not aware of the manner in which the miner died. Decision and Order at 14. The administrative law judge also permissibly accorded less weight to Dr. Jurich's opinion because the doctor did not identify any supporting rationale for his conclusion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 14. Although the administrative law judge acknowledged that Dr. Jurich possessed superior and relevant knowledge about the miner's pulmonary condition, he found that Dr. Jurich's status as treating physician did not provide him with any advantage in ascertaining the cause of the miner's death since his treatment of the miner ceased two years before the miner's death. Decision and Order at 14. We, therefore, hold that the administrative law judge acted within his discretion in finding that Dr. Jurich's opinion was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Claimant also contends that the administrative law judge failed to address the fact that the miner's death certificate lists black lung as a cause of the miner's death. Mr. J.R. Frisby, a coroner, completed the miner's death certificate. Mr. Frisby indicated that the miner's death was due to respiratory arrest due to cardiac arrest and Black Lung. Director's Exhibit 10. However, because the miner's death certificate was completed by a coroner who provided no basis for his findings, we find that the administrative law judge's failure to address the significance of the miner's death certificate is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant finally contends that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. However, because Dr. Rosenberg's opinion does not assist claimant in establishing that the miner's death was due to pneumoconiosis,⁶ the administrative law judge's error, if any, in his consideration of Dr. Rosenberg's opinion is harmless. *See Larioni, supra*. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁷

⁶ Dr. Rosenberg, a physician Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence. In a report dated April 10, 2001, Dr. Rosenberg opined that:

[The miner] did not have [coal workers' pneumoconiosis]. In addition, he had no impairment arising from his coal mining employment and the inhalation of coal dust prior to his death; he had the respiratory ability to perform his underground coal mine work prior to his death. Additionally, his death was not caused or hastened by the presence of [coal workers' pneumoconiosis]. While [the miner] had [chronic obstructive pulmonary disease], its presence related to his long smoking history; it was not related or aggravated by the inhalation of coal mine dust.

Director's Exhibit 37.

⁷ In light of our affirmance of the administrative law judge's finding that the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we need not address employer's contention that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it holds that the administrative law judge properly found that the miner's claims were not properly before him. I dissent from the majority's determination to affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

I agree with claimant's contention that the administrative law judge erred in his consideration of Dr. Jurich's opinion. The administrative law judge found that the record did not support Dr. Jurich's assessment that the miner's chronic obstructive pulmonary disease was severe. Decision and Order at 14. However, in his November 1, 2002, report, Dr. Jurich provided an explanation for his assessment. Claimant's Exhibit 2. Dr. Jurich noted that Dr. Broudy opined that the miner did not retain the pulmonary capacity to work as a coal miner due to his chronic obstructive pulmonary disease. *Id.* Dr. Jurich also noted that Dr. Dahhan, in 1989, opined that the miner's chronic obstructive pulmonary disease was severe enough to render the miner totally disabled. *Id.* Dr. Vuskovich also noted that Dr. Meyers, in 1989, opined that the miner's severe restrictive and obstructive ventilatory defects rendered the miner "incapable of even normal physical activity." *See* Employer's Exhibit 1.

Dr. Jurich also explained that the pulmonary function studies cited by Dr. Vuskovich showed a decline in the miner's FEV1 values from 1976 through 1994. Claimant's Exhibit 2. Dr. Jurich explained that this decline was "rather dramatic and consistent with chronic obstructive airway disease and the contributing pneumoconiosis." *Id.* Relying upon evidence set out in Dr. Vuskovich's report, Dr. Jurich further noted that the results of the miner's arterial blood gas studies demonstrated a "severe pulmonary impairment." *Id.* Thus, contrary to the administrative law judge's finding, Dr. Jurich provided support for his assessment of "severe" chronic obstructive pulmonary disease. Moreover, in assessing whether the evidence is sufficient to support such a finding, the administrative law judge should not have limited his review to the newly submitted evidence, but should have reviewed all of the relevant evidence of record.

I would also hold that the administrative law judge erred in finding that Dr. Jurich, at the time that he rendered his opinion, was unaware of the manner in which the miner died. During his July 11, 2001 deposition, Dr. Jurich acknowledged that he was unaware of the miner's final cause of death. Director's Exhibit 37 at 12. However, Dr. Jurich subsequently reviewed Dr. Vuskovich's September 12, 2002 report in which Dr. Vuskovich accurately characterized the miner's death certificate. *See* Employer's Exhibit 1. Consequently, Dr. Jurich, at the time that he completed his November 1, 2002 report, was aware that the miner died of "natural causes with severe respiratory problems being a significant contributing factor." Claimant's Exhibit 2.

The administrative law judge also erred to the extent that he accorded less weight to Dr. Jurich's opinion because it was "not clear if Dr. Jurich had access to the medical evidence contained in Dr. Vuskovich's report, or if Dr. Jurich just read Dr. Vuskovich's summary of the evidence." As long as Dr. Jurich relied upon accurate information, the source of that information is irrelevant. Moreover, contrary to the administrative law judge's characterization, Dr. Vuskovich did not merely provide a summary of the evidence. Dr. Vuskovich provided a detailed description of the evidence that he reviewed. *See* Employer's Exhibit 1.

Finally, although the administrative law judge acknowledged that Dr. Jurich possessed superior and relevant knowledge about the miner's pulmonary condition, the administrative law judge found that Dr. Jurich did not hold the same type of knowledge about the circumstances of the miner's death since his treatment relationship had ended two years prior to the miner's death. The administrative law judge failed to explain the significance of this information. The administrative law judge found that Dr. Rosenberg's opinion regarding the miner's cause of death was entitled to probative weight despite the fact that Dr. Rosenberg's opinion was limited to a review of the medical evidence. Dr. Jurich also was aware of evidence developed subsequent to his last treatment of the miner.

In light of the above-referenced errors, I would vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.⁸

BETTY JEAN HALL
Administrative Appeals Judge

⁸ I also agree with claimant's contention that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion pursuant to 20 C.F.R. §718.205(c). Dr. Rosenberg opined that the miner's death was not caused or hastened by the presence of coal workers' pneumoconiosis. Although Dr. Rosenberg diagnosed chronic obstructive pulmonary disease, he related the disease to the miner's smoking history and found that the disease was neither related to, nor aggravated by, the inhalation of coal mine dust. Director's Exhibit 37. Although the administrative law judge found that Dr. Rosenberg relied upon adequate data to support his findings, the administrative law judge did not provide any basis for his conclusion. Consequently, I would remand the case to the administrative law judge with instructions to address whether Dr. Rosenberg's opinion regarding the cause of the miner's death is sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).