

BRB No. 12-0661 BLA

RHONDA SUE GOOD)
(Widow of HOMER GOOD))
)
Claimant-Respondent)
)
v.)
)
GLEN ALLEN MINING, INCORPORATED) DATE ISSUED: 07/30/2013
)
and)
)
EMPLOYERS INSURANCE OF WAUSAU)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Survivor's Benefits (2010-BLA-05646) of Administrative Law Judge Stephen M. Reilly, with respect to a claim filed on September 18, 2009, pursuant to the provisions of the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ The administrative law judge found that the miner had twenty-four years of coal mine employment, at least fifteen of which were in underground mines or in conditions substantially similar to those in an underground mine. In addition, the administrative law judge determined that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.

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.² 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).

After the briefing schedule in this appeal was complete, employer filed a motion for remand, premised upon the Emergency Order of Suspension of the medical license of Dr. James A. Dennis, issued by the Kentucky Board of Medical Licensure on August 17, 2012. Employer maintains that the Emergency Order of Suspension, and the Complaint upon which it was based, contain information establishing that Dr. Dennis engaged in conduct "likely to deceive, defraud, or harm the public." Employer's Motion and Affidavit for Remand to Reopen the Record at 2. Employer further alleges that, because Dr. Dennis's conduct calls into question the veracity of his medical opinion, the administrative law judge must reconsider her decision to rely on his diagnosis of complicated pneumoconiosis to find that claimant invoked the irrebuttable presumption

¹ Claimant is the widow of the miner, Homer Good, who died on June 23, 2006. Director's Exhibit 10. The miner was not receiving federal black lung benefits at the time of his death.

² The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 5-6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.304.³ Accordingly, employer requests remand "to the [administrative law judge] for appropriate consideration of the evidence in light of Dr. Dennis'[s] behavior."⁴ *Id.* Claimant responds, asserting that there were no charges pending at the time Dr. Dennis performed the autopsy of the miner, the charges do not relate to his performance of autopsies, and Dr. Dennis has not been finally convicted in the matter.

Because employer's new evidence, if admitted, could affect the administrative law judge's weighing of the autopsy evidence pursuant to 20 C.F.R. §718.304, we remand the case to the administrative law judge to consider whether the new evidence should be admitted into the record. *See* 20 C.F.R. §§725.455(c), 802.404(a), 802.405(a); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999)(en banc); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-46, 1-48 (1989)(en banc). If the administrative law judge admits the new evidence, he must determine whether it alters the weight to which Dr. Dennis's diagnosis of complicated pneumoconiosis is entitled. If the administrative law judge finds that Dr. Dennis's opinion is entitled to diminished weight, the administrative law judge must reconsider his finding that claimant established the existence of complicated pneumoconiosis, and invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

In the event that the administrative law judge concludes that claimant cannot prove that the miner had complicated pneumoconiosis, he must determine whether claimant can otherwise establish entitlement to benefits in her survivor's claim. The administrative law judge's consideration of the claim under these circumstances must include a determination of the applicability of the rebuttable presumption of death due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4).⁵

³ Dr. Dennis set forth diagnoses of complicated pneumoconiosis in an August 14, 2006 autopsy report, his January 24, 2011 deposition testimony, and a supplemental report dated September 30, 2011. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 1. At his deposition, Dr. Dennis testified that the date on his autopsy report was inaccurate, as he performed the autopsy shortly after the miner's death on approximately June 24, 2006. Employer's Exhibit 1 at 4.

⁴ By Order dated January 23, 2013, the Board denied employer's motion for remand, stating that "the appropriateness of a remand will be considered once the Board issues a Decision and Order in this case." *Good v. Glen Allen Mining, Inc.*, BRB No. 12-0661 BLA (Jan. 23, 2013)(unpub. Order).

⁵ Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of

Accordingly, the administrative law judge's Decision and Order Awarding Survivor's 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

JUDITH S. BOGGS
Administrative Appeals Judge

underground coal mine employment or employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).