

BRB No. 99-1033 BLA

VIVIAN D. CREIGHTON)
(Widow of LOWELL CREIGHTON))

Claimant-Petitioner)

v.)

BEE COAL COMPANY)

and)

THREE X COAL COMPANY)

Employers)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Order Sustaining Director's Objection to Admission of Medical Evidence and the Decision and Order - Denial of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, Manchester, Kentucky, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge

PER CURIAM:

Claimant¹ appeals the Order Sustaining Director's Objection to Admission of Medical Evidence and the Decision and Order - Denial of Benefits (97-BLA-0696) of Administrative Law Judge Paul H. Teitler denying benefits on 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 case is before the Board for the second time. On remand, the administrative law judge sustained the objection of the Director, Office of Workers' Compensation Programs (the Director), to claimant's motion to reopen the record in order to submit additional medical evidence and then found that 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 the survivor's claim.

On appeal, claimant initially challenges the administrative law judge's determination to sustain the Director's objection to claimant's motion to reopen the record to allow her to submit additional evidence in the form of additional reports by Drs. Vaezy and Baker. Claimant requests that the Board instruct the administrative law judge to consider this additional evidence. Claimant also asserts that the administrative law judge erred at Section 718.205(c), in failing to adequately explain his rationale for rejecting the opinions of Drs. Vaezy and Baker. Claimant also contends that the administrative law judge failed to consider the lay testimony of the widow and her son, and asserts that this is relevant evidence. The Director, in response, asserts that the

¹Claimant is Vivian D. Creighton, widow of Lowell Creighton, the miner, who died on August 21, 1994. Director's Exhibit 6. Claimant filed the instant survivor's claim on September 19, 1994. Director's Exhibit 1. Originally, the administrative law judge awarded benefits in a Decision and Order dated September 10, 1997. Following the Director's appeal, the Board vacated the administrative law judge's findings at 20 C.F.R. §718.205(c), and remanded the case with instructions for him to explain why he found the opinions of Drs. Vaezy and Baker reasoned. *Creighton v. Bee Coal Co.*, BRB No. 98-0145 BLA (Oct. 8, 1998)(unpub.).

administrative law judge's determination not to reopen the record was within his discretion and that his finding that the evidence fails to establish that the miner's death was due to pneumoconiosis pursuant to Section 727.205(c) is supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's denial of benefits.

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

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)- (4), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) in order to establish entitlement to survivor's benefits. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Initially, claimant challenges the administrative law judge's determination to sustain the Director's objection to claimant's submission of additional evidence on remand. Following the Board's remand of the case to the administrative law judge, claimant submitted medical reports from Drs. Baker and Vaezy in which they sought to explain their prior opinions. The Director opposed their admission into the record, arguing that inasmuch as claimant could have obtained and proffered this evidence at several junctures prior to the issuance of the administrative law judge's initial Decision and Order, the regulations did not permit their admission on remand. *See* 20 C.F.R. §§725.421, 725.455(b), 725.456. In an Order dated February 25, 1999, the administrative law judge refused to admit the reports of Drs. Baker and Vaezy into the record, as he found that the Director's objections had merit. Claimant subsequently filed a motion requesting that the administrative law judge reopen the record. The administrative law judge denied this motion as untimely in the Decision and Order that is the subject of claimant's appeal. Decision and Order - Denial of Benefits at 2.

Claimant contends that she should have the right to present additional evidence and asserts that Section 725.456(c) should be liberally construed so as to allow for all affirmative relevant evidence to be considered. The Director urges affirmance of the

administrative law judge's finding, noting that the evidence filed by claimant on remand could support a request for modification under 20 C.F.R. §725.310. The determination as to whether it is necessary to reopen the record on remand falls within the broad discretion accorded the administrative law judge in resolving procedural issues. *See* 20 C.F.R. §725.456(c); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In the instant case, the administrative law judge acted rationally in finding the Director's objections persuasive and in refusing to admit claimant's evidence. Decision and Order at 2. We affirm, therefore, the administrative law judge's determination to deny claimant's attempts to reopen the record on remand, as within his discretion.

Claimant also challenges the administrative law judge's determination that the opinions of Drs. Vaezy and Baker, who opined that pneumoconiosis hastened the miner's death, Director's Exhibit 9; Claimant's Exhibit 1, are insufficient to establish that the miner's death was hastened by pneumoconiosis under the standard set forth by the United States Court of Appeals for the Sixth Circuit in *Brown, supra*. Claimant asserts that the administrative law judge failed to explain why he rejected these opinions. Claimant also contends that the administrative law judge erred by failing to consider the lay testimony of record at Section 718.205(c). We disagree. The administrative law judge considered both the opinions of Dr. Vaezy and Baker on remand, as instructed by the Board. *Creighton*, slip op. at 3. The administrative law judge, however, permissibly found that these opinions were not sufficiently reasoned, as they failed to explain how they arrived at the conclusions they reach. *See Pettry v. Director*, OWCP, 14 BLR 1-98 (1990); *Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). Decision and Order - Denial of Benefits at 3-4. Moreover, the regulations clearly state that as the cause of the miner's death is a medical determination, "competent medical evidence" is required to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). *See* 20 C.F.R. §718.205(c), (d). We reject, therefore, claimant's contention that the administrative law judge erred in failing to consider the lay testimony of record. We affirm, therefore, the administrative law judge's findings pursuant to Section 718.205(c), and thereby, affirm the administrative law judge's denial of the claim in the instant case. *See Trumbo, supra*; *Neeley, supra*.

Accordingly, the administrative law judge's Order Sustaining Director's Objection to Admission of Medical Evidence and Decision and Order - Denial of Benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge