

BRB No. 98-1218 BLA

MARY M. VANDERGRIFF)
(Widow of HOMER C. VANDERGRIFF))
)
Claimant-Respondent)
)
v.)
)
JEWELL RIDGE MINING CORPORATION/) DATE ISSUED:
SEA "B" MINING COMPANY)
)
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 Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp (Browning, Lamie & Sharp, P.C.), Lebanon, Virginia, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-BLA-1441) of Administrative Law Judge Richard K. Malamphy 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 U.S.C. §901 *et seq.* (the Act).¹ The

¹Claimant, Mary Vandergriff, is the widow of the miner, Homer Vandergriff, who died on April 16, 1996. The death certificate lists the miner's cause of death as disseminated

administrative law judge found that the evidence established a coal mine employment history of eighteen years, Decision and Order at 3, 24, and concluded that the previous decisions in this case established the presence of pneumoconiosis. Decision and Order at 3. The administrative law judge further concluded that a totally disabling respiratory impairment was established pursuant to the blood gas study evidence and medical opinion evidence at 20 C.F.R. §718.204(c)(2), (4). Decision and Order at 4-22. The administrative law judge further found that total disability was due, at least in part, to pneumoconiosis, a finding which the administrative law judge concluded supported a change in conditions pursuant to 20 C.F.R. 725.310. Decision and Order at 22-23. Further, the administrative law judge concluded that claimant was entitled to the presumption, found at 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment. Decision and Order at 24. Accordingly, the administrative law judge awarded benefits on the miner's claim. Considering the survivor's claim, the administrative law judge concluded that the evidence established that pneumoconiosis was a

aspergillosis due to immunosuppression, rheumatoid arthritis and coal miners' pneumoconiosis. Director's Exhibit 152. The instant appeal encompasses awards of benefits on both a miner's claim and a survivor's claim. The miner initially filed a claim for benefits on October 30, 1984, Director's Exhibit 1. Benefits were eventually denied on this claim by Administrative Law Judge Giles McCarthy in a Decision and Order issued on February 7, 1988. Director's Exhibit 38. Subsequently, the miner requested modification, which was again denied by Administrative Law Judge McCarthy in a Decision and Order issued September 29, 1994. Director's Exhibit 12. On March 3, 1995, the miner filed another request for modification Director's Exhibit 119, and, subsequent to the miner's death, claimant, on April 16, 1996, filed a separate survivor's claim for benefits. Subsequent to a hearing, the administrative law judge, on May 22, 1998, issued the Decision and Order awarding benefits from which employer now appeals.

substantially contributing factor in the miner's death. Decision and Order at 25-34. Accordingly, benefits were awarded on the survivor's claim.

On appeal, employer contends that the administrative law judge erred in concluding that pneumoconiosis was a contributing cause of disability in the miner's claim. Employer further asserts that the administrative law judge erred in awarding survivor's benefits. Claimant responds and urges affirmance of the award of benefits on both claims. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief in this appeal.²

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).

Employer asserts that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis as the administrative law judge erred in according greatest weight to the opinions of Drs. Robinette and Rasmussen, both of whom concluded that the miner was totally disabled from coal mine employment due to pneumoconiosis, Director's Exhibits 35, 40, 80, 101, 120. Employer asserts that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Fino, who concluded that while the miner was disabled, there was no evidence that such a disability arose from any disease arising out of coal mine employment, Director's Exhibits 72, 105; Employer's Exhibit 1, particularly in light of the administrative law judge's determination that Dr. Fino's qualifications were superior to those of Dr. Robinette and that he had provided a well-reasoned opinion.

The United States Court of Appeals for the Fourth Circuit, within whose

²We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his implicit determination that claimant suffered from the existence of pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, on the same basis, the administrative law judge's determination that claimant established a change in conditions pursuant to Section 725.310, that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment, and the finding that the miner suffered from a totally disabling respiratory impairment pursuant to Section 718.204(c). *See Skrack, supra.*

jurisdiction this claim arises, has held that in order to carry his burden at Section 718.204(b), a claimant must prove that pneumoconiosis was at least a contributing cause of the miner's total disability. See *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

In finding that claimant carried her burden at Section 718.204(b), the administrative law judge concluded that he concurred in the Dr. Robinette's determination that pneumoconiosis was a substantial contributor to claimant's total disability. Decision and Order at 23. The administrative law judge noted that Dr. Robinette was claimant's treating physician and that his medical conclusions "reflect outpatient treatment in April 1994 and hospital admission on May 31, 1994." Decision and Order at 23. The administrative law judge further concluded that Dr. Fino has superior qualifications to those of Dr. Robinette and that the opinions rendered by Dr. Fino were well-reasoned. Decision and Order at 22-23.

The Administrative Procedure Act (the APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all material issues of fact, law or discretion presented...." 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) and U.S.C. §932(a). In the instant case, the administrative law judge failed to fully explain his basis for concluding that the medical opinions of Dr. Robinette were entitled to greater weight than the well-reasoned opinions of Dr. Fino, particularly in view of the administrative law judge's conclusion that Dr. Fino possessed superior credentials. We conclude that this failure constitutes a violation of the APA.³ Moreover, the decision does not reflect any consideration by the administrative law judge of other evidence of record relevant to Section 718.204(b), e.g., medical opinions which, if fully credited, would support a finding of total disability due to pneumoconiosis.⁴ See Director's Exhibits

³While the administrative law judge may accord greater weight to the opinion of a treating physician, he is under no affirmative duty to do so. See *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). Moreover, the Fourth Circuit court has held that an administrative law judge may accord greater weight to the opinions of physicians with superior qualifications. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In any event, the administrative law judge has not indicated the basis of his decision to accord greater weight to the opinion of Dr. Robinette. Decision and Order at 23.

⁴Both Dr. Sargent and Dr. Castle have rendered opinions diagnosing the miner as totally disabled due to pneumoconiosis. Director's Exhibits 36, 42, 94, 105.

36, 42, 94, 105. The failure of the administrative law judge to consider relevant evidence requires remand. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Accordingly, we vacate the administrative law judge's determination that claimant established that the miner's total disability was due to pneumoconiosis and thus vacate the award of benefits on the miner's claim and remand the claim for further consideration of the entirety of relevant evidence pursuant to Section 718.204(b).⁵ See *Hobbs, supra*; *Robinson*.

⁵Employer further asserts that Dr. Robinette's opinion is flawed because of his reliance on a diagnosis of complicated pneumoconiosis. Director's Exhibit 153. Inasmuch as the existence of complicated pneumoconiosis was previously found not to have been established in this case, see Director's Exhibit 38, the administrative law judge must, on remand, consider Dr. Robinette's diagnosis in this regard, to the extent that the physician's conclusions are based on such a diagnosis, and the administrative law judge must make credibility determinations regarding the probative value of the opinion. See *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); see generally *Piney Mountain Coal Co. v. Mays*, No. 97-2560, slip op. (4th Cir.)(May 5, 1999). Further, employer asserts that Dr. Robinette's opinion of pneumoconiosis is based on a medical opinion rendered by Dr. Jackson, Director's Exhibit 130. Employer asserts that while Dr. Jackson indicated that the miner suffered from pneumoconiosis such a conclusion was an "historical diagnosis," Employer's Brief at 7, and did not provide a valid basis for Dr. Robinette to conclude that the miner suffered from the disease. Inasmuch as the opinion of Dr. Robinette is based on the physician's independent

Employer next contends that the administrative law judge erred in awarding benefits on the survivor's claim inasmuch as the administrative law judge improperly relied on the opinion of the autopsy prosector, Dr. Sides, Director's Exhibit 174, to reach the conclusion that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

In order to establish entitlement to benefits on a survivor's claim pursuant to Section 718.205(c), a claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2). See *Neely v. Director, OWCP*, 11 BLR 1-85 (1988); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that a substantially contributing factor is any condition which hastens the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); see *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). In the instant survivor's claim, having established the existence of pneumoconiosis, the burden on claimant is to establish that the pneumoconiosis substantially contributed to the miner's death. See *Shuff, supra*.

In concluding that claimant established that the miner's death was due to pneumoconiosis, the administrative law judge relied primarily on the opinion of the autopsy prosector, Dr. Sides, along with the "opinions of other pathologists who concur with Dr. Sides," specifically, Drs. Steffanini, Buddington and Crouch, Director's Exhibits 175, 176, 194. Decision and Order at 34. A review of Dr. Sides's autopsy opinion demonstrates that the physician only comments upon the possible existence of coal workers' pneumoconiosis and not whether the disease caused, contributed to or hastened the death of the miner. Director's Exhibit 174. Thus, the

assessment of the miner's condition, see Director's Exhibits 35, 120, we reject employer's assertion in this regard. See generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.* 8 BLR 1-46 (1985).

opinion, on its face, is not supportive of claimant's burden at Section 718.205(c). See *Shuff, supra*. Accordingly, we vacate the administrative law judge's determination that claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and remand the claim for a weighing of the entirety of relevant evidence of record regarding the cause of the miner's death. We, therefore, vacate the award of benefits on the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on both the miner's and the survivor's claims is affirmed in part, vacated in part, and the case is remanded for further consideration on both claims.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge