

BRB No. 04-0558 BLA

CARRIE E. DEVINE (Widow of and o/b/o)
GEORGE M. DEVINE, JR.))

Claimant-Petitioner)

v.)

PEABODY COAL COMPANY)

DATE ISSUED: 03/23/2005

and)

OLD REPUBLIC INSURANCE COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Carrie E. Devine, Beaver Dam, Kentucky, *pro se*.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order on

¹ Claimant, the miner’s widow, is appealing the denial of benefits on both the miner’s claim and her own survivor’s claim.

Remand – Denial of Benefits (00-BLA-0059) of Administrative Law Judge Robert L. Hillyard rendered on a miner’s duplicate 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).² This case is before the Board for the second time.

The history of this case follows. The miner filed his first claim for benefits with the Department of Labor (DOL) on December 16, 1982. Director’s Exhibit 1. Following a hearing, Administrative Law Judge V.M. McElroy found that the existence of pneumoconiosis established pursuant to Section 718.202(a)(1)(2000), based on the true doubt rule, but found that the evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(2000). Accordingly, benefits were denied. Decision and Order dated February 23, 1987. Director’s Exhibit 26.

The miner filed a second claim for benefits on July 13, 1998. Director’s Exhibits 27, 30, at 90. The miner died on January 30, 1999. Director’s Exhibits 7, 9. Claimant filed an application for survivor’s benefits on February 8, 1999. Director’s Exhibit 1. Following a hearing on these claims, Administrative Law Judge Robert L. Hillyard (the administrative law judge) found that claimant failed to establish a material change in conditions by failing to establish total respiratory disability and denied benefits on the miner’s claim. With respect to the survivor’s claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis or that the miner’s death was due to pneumoconiosis, and thereby, denied benefits on the survivor’s claim.

Pursuant to claimant’s appeal, we vacated the administrative law judge’s finding that the evidence failed to establish a material change in conditions in the miner’s claim and remanded the case for reconsideration because the administrative law judge failed to consider whether the newly submitted evidence established total respiratory disability without regard to cause of total disability. Also, on remand we instructed the administrative law judge to reconsider the x-ray and medical opinion evidence on the existence of pneumoconiosis as that element was relevant to consideration of the miner’s claim. Regarding the survivor’s claim, we affirmed the administrative law judge’s finding that death was not due to pneumoconiosis, and, therefore, affirmed the administrative law judge’s denial of benefits on the survivor’s claim. *Devine v. Peabody Coal Co.*, BRB No. 02-0669 BLA (June 24, 2003) (unpub.).

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.

In reconsidering the miner's claim on remand, the administrative law judge found that employer conceded that the miner was totally disabled. The administrative law judge found, therefore, that the evidence established a material change of conditions. Considering the evidence as a whole, however, the administrative law judge found that it failed to establish the existence of pneumoconiosis. Accordingly, the administrative law judge again denied benefits in the miner's claim.³

On appeal, claimant challenges the administrative law judge's denial of benefits. By Order dated September 13, 2004, the Board acknowledged receipt of the motion by claimant's counsel dated August 23, 2004 to withdraw his representation of claimant. Accordingly, the Board stated that as claimant was no longer represented by counsel, it would review claimant's appeal under the general standard of review, which is whether the Decision and Order of the administrative law judge is rational, in accordance with law, and supported by substantial evidence. 20 C.F.R. §§802.211(3), 802.220. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not file a response brief.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In finding that the x-ray evidence failed to establish the existence of pneumoconiosis, the administrative law judge considered the positive x-ray readings of Drs. Sargent, Gallo, Anderson and O'Bryan, as instructed. *Devine*, BRB No. 02-0669 at 8-9. Considering the x-ray as a whole, the administrative law judge concluded that the negative readings by more

³ Although we previously affirmed the administrative law judge's denial of benefits on the survivor's claim, the administrative law judge reiterated that the survivor's claim was denied based on our affirmance of his finding that the evidence failed to establish that the miner's death was due to pneumoconiosis. Decision and Order on Remand at 24. Because we previously affirmed the administrative law judge's denial of the survivor's claim, we will not address it again. See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

qualified physicians outweighed the less numerous positive readings, and, therefore, found that claimant failed to establish the existence of pneumoconiosis. This was proper. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Accordingly, the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1) is affirmed.

Next, in finding that the medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4), the administrative law judge considered all the relevant medical opinion evidence or record and evaluated the opinions pursuant to our instructions. *See Devine*, BRB No. 02-0669 at 9-11. Taken as a whole, the administrative law judge concluded that the medical opinion evidence failed to establish the existence of pneumoconiosis as the opinions of the physicians who found that the miner did not have pneumoconiosis were better reasoned. This was proper. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Further, as instructed, the administrative law judge considered the opinions of the miner's treating physicians, but permissibly accorded them less weight because the physicians did not have any specific credentials compared to other physicians, and their opinions were not as well-reasoned as the other opinions of record. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *see 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). Additionally, the administrative law judge properly credited the opinions of reviewing physicians. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits on the miner's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge