

BRB No. 00-0701 BLA

ESTATE OF ANN KROFCHECK)
(Widow of PAUL KROFCHECK))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: _____
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Howard J. Levin (Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, P.C.), Philadelphia, Pennsylvania, for claimant.

Sarah M. Hurley (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (97-BLA-1916) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) denying

¹Claimant is the estate of Ann B. Krofcheck, the deceased widow of the miner, Paul L. Krofcheck.

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 is before the Board for the fifth time. In a Decision and Order dated October 7, 1998, the administrative law judge credited the miner with eleven to thirteen years of coal mine employment and adjudicated the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.³ The administrative law judge found the

²The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

³The miner filed a claim on May 22, 1978. Director's Exhibit 1. While the miner's claim was pending before the district director, the miner died on February 24, 1979. Director's Exhibits 1, 5. The miner's widow filed a survivor's claim on March 14, 1979. Director's Exhibit 1. On June 23, 1983, Administrative Law Judge Thomas M. Burke issued a Decision and Order denying benefits in both the miner's claim and the survivor's claim, Director's Exhibit 16, which the Board affirmed, *Krofcheck v. Director, OWCP*, BRB No. 82-0671 BLA (May 16, 1984)(unpub.). Judge Burke denied benefits because the evidence was insufficient to establish the existence of pneumoconiosis, total disability and death due to pneumoconiosis. Director's Exhibit 16. Following claimant's appeal, the case was forwarded to the United States Court of Appeals for the Third Circuit which affirmed the denial of benefits. *Krofcheck v. Benefits Review Board*, No. 84-3436 (3d Cir. Feb. 4, 1985). The district director construed an August 29, 1985 letter in support of the claims from United States Representative Doug Walgren, on behalf of the miner's widow, as a request for modification. Director's Exhibits 26, 27. On January 25, 1990, Administrative Law Judge Michael P. Lesniak (the administrative law judge) issued a Decision and Order on Request for Modification denying benefits in both the miner's claim and the survivor's claim because the evidence was insufficient to establish entitlement to benefits under 20 C.F.R. §410.490 and Parts 410, 718 and 727. Director's Exhibit 39. In response to an appeal by the miner's widow, the Board noted that entitlement to benefits was precluded at 20 C.F.R. §410.490 and affirmed the administrative law judge's findings under 20 C.F.R. Part 727. *Krofcheck v. Director, OWCP*, BRB No. 90-1995 BLA (July 15, 1993)(unpub.). However, the Board vacated the administrative law judge's findings under 20 C.F.R. Part 718 and remanded the case for further consideration of the evidence. *Id.* On December 3, 1993, the administrative law judge issued a Decision and Order on Remand denying benefits in both the miner's claim and the survivor's claim because the evidence was insufficient to establish entitlement to benefits under 20 C.F.R. Part 718. Director's Exhibit 53. In disposing of an appeal by the miner's widow, the Board affirmed the administrative law judge's findings under 20 C.F.R.

evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000).⁴ Consequently, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).⁵ Accordingly, the administrative law judge denied benefits in both the miner's claim

Part 718. *Krofcheck v. Director, OWCP*, BRB No. 94-2352 BLA (Mar. 28, 1995)(unpub.). While the case was pending before the Board, the miner's widow died on November 17, 1994. Director's Exhibit 65. In a letter dated May 6, 1995, claimant asked United States Senator Arlen Specter to help in obtaining reconsideration of the Board's Decision and Order. Director's Exhibit 63. In a letter on behalf of claimant dated May 18, 1995, Senator Specter enclosed a copy of claimant's May 6, 1995 letter and requested either reconsideration of the Board's decision or modification at the district director level. *Id.* The Board construed claimant's May 6, 1995 letter as a request for modification. *Krofcheck v. Director, OWCP*, BRB No. 94-2352 BLA (Feb. 23, 1996)(Order)(unpub.).

⁴The administrative law judge stated that “[c]laimant failed to take action concerning her claim under Parts 727 and Section 410.490 following affirmance by the Board on July 15, 1993.” [1998] Decision and Order on Modification at 8. The administrative law judge therefore stated, “[f]or that reason, I find the Board's July 15, 1993 decision as to Parts 727 and Section 410.490 final and will only consider the [m]iner's and survivor's claims under Part 718 of the regulations.” *Id.*

⁵Inasmuch as the miner died in 1979, the sole ground for modification at 20 C.F.R.

and the survivor's claim.

§725.310 (2000) is that there has been a mistake in a determination of fact.

In response to claimant's appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(4) (2000). However, the Board vacated the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000) because the administrative law judge did not consider the relevant lay evidence in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to further consider the evidence at 20 C.F.R. §§725.310 (2000) and 718.202(a) and (c) (2000). The Board also instructed the administrative law judge to consider whether the evidence is sufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000) by establishing invocation of either the interim presumption of total disability due to pneumoconiosis or death due to pneumoconiosis at 20 C.F.R. §727.203(a)⁶ or the rebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.303 (2000). *Krofcheck v. Director, OWCP*, BRB No. 99-0141 BLA (Oct. 12, 1999)(unpub.).

On remand, the administrative law judge adjudicated both the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Parts 727 and 718. Although the administrative law judge found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(5), he found, assuming *arguendo* that invocation were established, that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). The administrative law judge further found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000). In addition, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §§718.205(b) (2000) and 718.303 (2000). Consequently, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), (a)(2), (a)(4) and (a)(5). Claimant also contends that the administrative law judge failed to conduct a proper *de novo* review of the entire record under 20 C.F.R. §725.310 in accordance with *Keating*. Citing *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 1-180 (3d Cir. 1987), claimant additionally contends that the administrative law judge should have considered the survivor's claim under 20 C.F.R. Part 410 in addition to 20

⁶The regulations contained in 20 C.F.R. Parts 410 and 727 are not affected by the recent amendments to the regulations.

C.F.R. Part 718. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which claimant and the Director have responded.

In a brief dated March 21, 2001, the Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. However, in a brief dated March 20, 2001, claimant asserted that the amended regulations at 20 C.F.R. §§725.103, 725.104(d), 718.201(a)(2), (c), 718.204(a) and 718.205(c) would affect the outcome of the case.

The revisions to the regulation at 20 C.F.R. §718.104(d) apply to claims filed after January 19, 2001. Consequently, the provision requiring that special consideration be accorded to the report of a treating physician does not apply to the instant claim. Application of the revised definition of pneumoconiosis would not alter the outcome of the instant case inasmuch as there is no evidence which pertains to the revisions at 20 C.F.R. §718.201(a)(1) and (c). Further, no substantive revisions have been made to the regulations which are relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Since the issue of total disability was not before the administrative law judge on remand, the revisions to the regulations at 20 C.F.R. §718.204(a) would not alter the outcome in the instant case.

Additionally, no substantive revisions have been made to the regulations which are relevant to the rebuttable presumption at 20 C.F.R. §718.303. Since the instant survivor's claim was filed prior to January 1, 1982, the revisions to the regulation at 20 C.F.R. §718.205(c) are not relevant to the instant case. Furthermore, since the burden of proof was on claimant, the revisions to the regulation at 20 C.F.R. §718.103 would not alter the outcome of the case.

In addition, the regulations contained in 20 C.F.R. Part 727 were not revised. Moreover, the revisions to the regulation at 20 C.F.R. §725.310 apply to claims filed after January 19, 2001. Consequently, the revisions to the provision governing modification of claims do not apply to the instant claim. Finally, the revisions to the regulations do not affect

the holding in *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

Claimant initially contends that the administrative law judge erred in finding the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), (a)(2), (a)(4) and (a)(5). However, claimant does not contest the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). Uncontested findings of the administrative law judge are generally affirmed by the Board. *See Skrack, supra*. Therefore, inasmuch as the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) is not challenged on appeal, we affirm this finding.⁷ *See Skrack, supra*. Further, inasmuch as we affirm the administrative law judge's finding at 20 C.F.R. §727.203(b)(4),⁸ we affirm the administrative law judge's denial

⁷We also note that the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) is supported by substantial evidence. *See Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984).

⁸Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Specifically, claimant asserts that the administrative law judge did not properly weigh the x-ray evidence of record. In his decision, the administrative law judge stated that "the x-ray evidence is clearly and overwhelmingly negative for pneumoconiosis." Decision and Order on Remand at 3. The administrative law judge therefore stated, "I reiterate the prior findings that the [c]laimant did not establish the presence of pneumoconiosis under [20 C.F.R.] § 718.202(a)(1)." *Id.* Additionally, the administrative law judge stated that "the [c]laimant has also failed to establish pneumoconiosis pursuant to [20 C.F.R.] § 718.202(a)(2) through biopsy or autopsy evidence." *Id.* at 3-4. In its prior Decision and Order, the Board affirmed the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(2) (2000). *Krofcheck v. Director, OWCP*, BRB No. 99-0141, slip op. at 6 BLA (Oct. 12, 1999)(unpub.). Consequently, the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and (a)(2)

of benefits under 20 C.F.R. Part 727.⁹

Next, claimant contends that the administrative law judge erred in failing to conduct a proper *de novo* review of the entire record under 20 C.F.R. §725.310 (2000) in accordance with *Keating*. In finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000), the administrative law judge stated that “the medical evidence fails to establish the presence of legal or medical pneumoconiosis.” Decision and Order on Remand at 7. The administrative law judge also stated that “the presence of pneumoconiosis is not established on the basis of the lay evidence.”¹⁰ *Id.* The administrative law judge observed that “the lay evidence establishes that the miner became ill when he suffered a heart attack in 1973.” *Id.* Inasmuch as the administrative law judge rationally found that “[t]he fact that the miner suffered from shortness of breath between 1973 and his death in 1979 is explained by the miner’s serious heart condition and stroke,” *id.*, we reject claimant’s assertion that the administrative law judge erred in failing to conduct a proper *de novo* review of the entire record under 20 C.F.R. §725.310 (2000) in accordance with *Keating*.¹¹ Moreover, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge’s finding that the evidence is insufficient to establish the existence

(2000) constitute the law of the case. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). Thus, we reject claimant’s assertion that the administrative law judge erred in his weighing of the x-ray evidence. Further, since the administrative law judge rationally found that “the [c]laimant has failed to establish pneumoconiosis on the basis of x-ray, biopsy, or autopsy evidence,” Decision and Order on Remand at 4, we affirm the administrative law judge’s finding that the evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Since we affirm the administrative law judge’s finding at 20 C.F.R. §727.203(a)(1), the administrative law judge’s finding at 20 C.F.R. §727.203(b)(4) is not precluded.

⁹Inasmuch as we affirm the alj’s that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4), we decline to address claimant’s assertions with respect to 20 C.F.R. §727.203(a)(2), (a)(4) and (a)(5).

¹⁰The administrative law judge stated, “I have carefully reviewed and weighed the testimony of the miner’s widow, Ann Krofcheck before [Judge] Burke on May 28, 1981 (DX 15), and Mrs. Krofcheck’s lengthy handwritten letter dated October 26, 1982 (DX 20).” Decision and Order on Remand at 6.

¹¹In view of our affirmance of the administrative law judge’s finding at 20 C.F.R. §727.203(b)(4), any error by the administrative law judge in his consideration of the lay evidence at 20 C.F.R. §727.203(a)(5) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

of pneumoconiosis. *See* 20 C.F.R. §718.202(a); *Williams, supra*.

Further, the administrative law judge found that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b) (2000) and that the evidence is insufficient to establish invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.303 (2000). The record contains the death certificate signed by Dr. Garofoli and the relevant reports of Drs. Cander, Freedman and Coyle. Dr. Cander opined that chronic obstructive pulmonary disease did not contribute to the miner's death. Director's Exhibits 84, 89. Dr. Coyle opined that the miner's chronic pulmonary disease exerted a deleterious effect on his overall cardiovascular pulmonary status and undoubtedly aggravated hypoxia, lessening the chances of surviving his cardiovascular illness. Director's Exhibits 34, 54, 55. Dr. Freedman opined that pneumoconiosis contributed to the miner's death. Director's Exhibits 73, 75, 80.

In the death certificate, Dr. Garofoli indicated that the miner's death was caused by cardiac arrest. Director's Exhibit 5. The administrative law judge properly accorded greater weight to the opinion of Dr. Cander than to the contrary opinions of record because he found Dr. Cander's opinion to be better reasoned.¹² *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's findings that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(b). Furthermore, inasmuch as there is no credible evidence that the miner's death was due to a respirable disease, we affirm the administrative law judge's finding that the evidence is insufficient to establish invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.303.

Finally, claimant contends that the administrative law judge should have considered the survivor's claim under 20 C.F.R. Part 410 in addition to 20 C.F.R. Part 718. In its prior

¹²The administrative law judge stated that "the better reasoned medical opinion evidence (e.g., Dr. Cander), as buttressed by the credible objective medical evidence, including the negative x-ray evidence, the majority of hospital records, and the miner's death certificate (DX 5), indicates that the miner suffered a cardiac death unrelated to a respiratory impairment and/or the miner's coal mine employment." Decision and Order on Remand at 7.

Decision and Order, the Board rejected claimant's contention that the administrative law judge erred in failing to consider entitlement under 20 C.F.R. Part 410, Subpart D. *Krofcheck v. Director, OWCP*, BRB No. 99-0141 BLA, slip op. at 8 n.7 (Oct. 12, 1999)(unpub.). Citing *Caprini*, the Board stated that "the Third Circuit Court has held that if a claimant fails to establish entitlement pursuant to Section 727.203, then the administrative law judge should consider entitlement pursuant to Part 718." *Id.* Inasmuch as there is no change in the relevant case law or regulations with regard to this issue, we are not persuaded by claimant's contention that the administrative law judge should have considered the survivor's claim under 20 C.F.R. Part 410 in addition to 20 C.F.R. Part 718. We therefore affirm the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge