

BRB Nos. 11-0190 BLA
and 11-0228 BLA

MAUDE S. KILLPACK, o/b/o and)
Widow of DWIGHT L. KILLPACK)
)
Claimant-Respondent)
)
v.)
)
BASIN RESOURCES, INCORPORATED)
)
and)
)
LIBERTY MUTUAL INSURANCE) DATE ISSUED: 11/28/2011
COMPANY)
)
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 on Remand of Richard K. Malamphy,
Administrative Law Judge, United States Department of Labor.

Wayne A. Freestone, Sandy, Utah, for claimant.

Scott M. Busser (Mosely, Busser & Appleton, P.C.), Denver Colorado, for
employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (07-
BLA-5649 and 07-BLA-5650) of Administrative Law Judge Richard K. Malamphy (the

administrative law judge) awarding benefits in both a miner's subsequent claim¹ and a survivor's claim² filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the second time. In the last appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). However, the Board vacated the award of benefits in both claims, and remanded this case to the administrative law judge for further consideration. In the miner's claim, because the administrative law judge conflated his consideration of the issues of total respiratory disability and disability causation, rather than addressing these two distinct elements of entitlement separately, the Board vacated the administrative law judge's finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Regarding the issue of total disability, the Board instructed the administrative law judge, on remand, to address evidence calling into question the reliability of the November 23, 2005 blood gas study under 20 C.F.R. §718.204(b)(2)(ii), and to explain which medical opinions he found demonstrative of total respiratory disability, addressing whether these opinions are sufficiently well-reasoned under 20 C.F.R. §718.204(b)(2)(iv). If, on remand, the administrative law judge found that new evidence submitted in support of the miner's subsequent claim was sufficient to establish total respiratory disability pursuant to Section 718.204(b), thereby establishing a change in an applicable condition of entitlement under Section 725.309, the Board instructed the administrative law judge to conduct a *de novo* review of the merits of the claim, based on a weighing of the evidence of record in its entirety. With respect to the survivor's claim, the Board vacated the administrative law judge's finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), based on the administrative law judge's failure to address whether the opinions of Drs. King, Gagon, and Repsher were sufficiently reasoned and documented, and remanded for further consideration of the medical

¹ The miner, Dwight L. Killpack, initially filed an application for benefits on January 11, 1991. Director's Exhibit 1. The district director denied the claim on June 18, 1991, finding that the miner established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish total disability due to pneumoconiosis. *Id.* The record does not demonstrate that the miner pursued this claim. The miner filed a subsequent claim on October 27, 2005, which is pending herein. Director's Exhibit 3.

² Claimant, Maude S. Killpack, is the widow of the miner, who died on January 6, 2006. Claimant filed a survivor's claim for benefits on August 7, 2006. Director's Exhibits 22, 24. The survivor's claim was consolidated with the miner's claim for adjudication and decision when the cases were before the administrative law judge.

opinions. *Killpack v. Basin Resources, Inc.*, BRB No. 09-0273 BLA (Nov. 9, 2009) (unpub.).

On remand, the administrative law judge accepted the parties' stipulation that the miner had at least twenty-one years of coal mine employment, and determined that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to Section 718.204(b),³ and a change in an applicable condition of entitlement under Section 725.309 in the miner's subsequent claim. The administrative law judge further found that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). In the survivor's claim, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis at Section 718.205. Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

In the present consolidated appeal, employer challenges the award of benefits in both claims. In the miner's claim, employer contends that the administrative law judge erred in finding the blood gas study evidence and the medical opinion evidence sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), (iv). In the survivor's claim, employer contends that the administrative law judge erred in finding that claimant established that the miner's death was due to pneumoconiosis under Section 718.205(c). In response, claimant urges affirmance of the awards of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he does not intend to participate in this appeal.⁴ The Director notes, however, that the recent amendments to the Act are applicable to both the miner's claim and the survivor's claim, as both claims were filed after January 1, 2005, and remained pending as of March 23, 2010. Therefore, the Director maintains that, in the event that the Board vacates the administrative law judge's Decision and Order on Remand and remands the case, the Board should instruct the administrative law judge to

³ The administrative law judge incorrectly cited to the old regulatory disability subsections, *e.g.*, Sections 718.204(c)(1)-(4), instead of the current regulatory subsections, those set forth in Sections 718.204(b)(2)(i)-(iv). Decision and Order on Remand at 6-10.

⁴ We affirm the administrative law judge's findings that claimant established that the miner worked in qualifying coal mine employment for at least twenty-one years and that the miner suffered from clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), as these findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 3, 5-6, 12.

consider the claims pursuant to amended Sections 411(c)(4) and 422(l) of the Act, 30 U.S.C. §§921(c)(4) and 932(l).⁵

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 the applicable law, they are binding upon this Board and may not be disturbed.⁶ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding the miner's claim, employer contends that the administrative law judge erred in failing to credit Dr. Repsher's invalidation of the qualifying arterial blood gas study⁷ dated November 23, 2005, and misapplied the reasoned medical opinion standard in finding total respiratory disability established at Section 718.204(b). Employer asserts that Dr. Gagon did not explicitly diagnose a totally disabling respiratory impairment, whereas Dr. Repsher possesses superior qualifications and provided a well-reasoned opinion that was entitled to greater weight. Employer essentially seeks a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

⁵ Section 411(c)(4) provides, *inter alia*, that "if a miner was employed for fifteen years or more in one or more underground coal mines, and ... if other evidence demonstrates the existence of a totally disabling respiratory impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Amended Section 422(l) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

⁶ As the miner's last coal mine employment occurred in Colorado, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

⁷ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in 20 C.F.R. Part 718, Appendices B or C, respectively. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer's arguments, the administrative law judge properly complied with the Board's remand instructions and adequately addressed the conflicting evidence concerning the reliability of the November 23, 2005 arterial blood gas study, which produced qualifying results. Director's Exhibit 11. After reviewing Dr. Repsher's testimony outlining his concerns with the test,⁸ the administrative law judge, within a rational exercise of his discretion, found that the probative value of Dr. Repsher's assessment was undermined based on: the comments of Dr. Gagon, the administering physician, who stated that the November 23, 2005 test "correlated with pulse oximetry;" the validation report of Dr. Kennedy, a Board-certified pulmonologist, who found that the test was technically acceptable and that it correlated with oximetry; and the discrepancy between Dr. Repsher's belief that the miner was not on supplemental oxygen at the time of the test, and Dr. Gagon's notation that the miner "uses 44m NC O2 continuous," Director's Exhibit 11. See *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 7-8; Hearing Transcript at 17-20, 39, 44-45. As neither Dr. Gagon nor Dr. Kennedy expressed "concerns" about the accuracy of the November 23, 2005 test, and the record contained no evidence demonstrating that the technician improperly administered the test, that the miner inadequately performed it, or that the values it produced were unreliable, the administrative law judge permissibly concluded that the test was sufficient to establish total disability pursuant to Section 718.204(b)(2)(ii). Decision and Order on Remand at 8; see *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1052, 13 BLR 2-372 (10th Cir. 1990).

⁸ In assessing Dr. Repsher's invalidation opinion, the administrative law judge stated:

At the hearing in late July 2008, Dr. Repsher questioned the validity of the blood gas values on the test in November 2005. He stated that PO₂ value of 38 was extremely low and suggested a venous rather than an arterial draw. ... Were the results an accurate arterial draw, he believed the miner should have been cyanotic or dark blue at the time of the test. ... Dr. Repsher also stated that the results were inconsistent with the results of the miner's pulse oximetry and that it would be impossible to have a valid PO₂ value of 38 and an oxygen saturation of 92 percent.

Decision and Order on Remand at 7-8; Hearing Transcript at 18-19.

In evaluating the medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge accurately reviewed the underlying bases for the physicians' conclusions, and determined that Dr. Gagon premised his opinion, that the miner suffered from a "severe impairment with chronic hypoxia," requiring four liters of oxygen, on the miner's medical and coal mine employment histories, a "minimal history of smoking," a physical examination, a positive chest x-ray, an abnormal pulmonary function study that produced qualifying pre-bronchodilator results,⁹ and a qualifying arterial blood gas study. Decision and Order on Remand at 9, 11; Director's Exhibit 11. The administrative law judge acknowledged that Dr. Gagon's qualifications were not contained in the record, but acted within his discretion in finding that the opinion was well-reasoned. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 10. The administrative law judge compared Dr. Gagon's diagnosis of a "severe impairment" with the exertional requirements of the miner's usual coal mine employment, as contained in the miner's Form CM-913, Description of Coal Mine Work and Other Employment,¹⁰ and rationally concluded that the miner's respiratory impairment "would preclude [the miner] from performing his usual coal mine work." Decision and Order on Remand at 9-10; Director's Exhibit 5; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990). Consequently, the administrative law judge properly found that Dr. Gagon's opinion was sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

By contrast, Dr. Repsher did not address whether the miner suffered a totally disabling respiratory impairment, but merely opined that coal dust exposure did not

⁹ Contrary to employer's assertion, the administrative law judge did not find that Dr. Gagon's pulmonary function study was unreliable. Employer's Brief at 21. Rather, the administrative law judge found that the pre-bronchodilator values of the study were minimally below qualifying levels; the post-bronchodilator values were slightly above qualifying levels; and that the criteria for establishing total respiratory disability were not met solely on the basis of the pulmonary function study values. Decision and Order on Remand at 7; Director's Exhibit 11.

¹⁰ The miner listed the exertional requirements of his coal mine employment, as the superintendent of a coal preparation plant and the surface operations, as: sitting for three hours per day; standing for nine hours per day; lifting 25 pounds 15 times per day; lifting 50 pounds 10 times per day; carrying 25 pounds 50 feet 15 times per day; and carrying 25 pounds 50 feet 10 times per day. Decision and Order on Remand at 9; Director's Exhibit 5.

contribute to any disability or cause the miner to become disabled. Director's Exhibit 34; Employer's Exhibit 1. Dr. Repsher, who never examined the miner, attributed the miner's respiratory impairment to Parkinson's Disease, and possibly smoking and asthma, explaining that studies by Drs. Lapp and Morgan show that "in the vast majority of miners, [simple coal workers' pneumoconiosis] does not affect their lung function test or blood gases." Hearing Transcript at 27; Decision and Order on Remand at 11. The administrative law judge permissibly discounted Dr. Repsher's opinion despite the physician's superior qualifications, as the administrative law judge determined that the miner had a minimal smoking history; that asthma was not well-documented in the record; and that Dr. Repsher did not address whether the miner "could have been among those whose lung function or blood gas tests are affected" by the simple pneumoconiosis that Dr. Repsher agreed was present on x-ray. Decision and Order on Remand at 11; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993). The administrative law judge rationally accorded determinative weight to the opinion of Dr. Gagon, that both pneumoconiosis and Parkinson's disease contributed to the miner's severe respiratory impairment, as he found it to be well-reasoned and well-documented. Decision and Order on Remand at 11; *see Fields*, 10 BLR at 1-22; *see also Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the weight of the evidence is sufficient to establish total disability due to pneumoconiosis at Section 718.204(b), (c). Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

Turning to the survivor's claim, employer asserts that the administrative law judge misapplied the reasoned medical opinion standard in finding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c). Employer challenges the administrative law judge's crediting of the opinions of Drs. Gagon and King, that pneumoconiosis was a contributing cause of the miner's death from pneumonia, over the contrary opinion of Dr. Repsher, that the most likely cause of the miner's death was aspiration pneumonia resulting from Parkinson's Disease. Employer again seeks a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson*, 12 BLR at 1-112. The administrative law judge was not persuaded by Dr. Repsher's testimony, that the presence of simple pneumoconiosis would have no effect on a Parkinson's patient's ability to survive pneumonia, Hearing Transcript at 24-25, or by his written explanation that "in view of the fact that . . . average coal miners with simple [pneumoconiosis] have normal overall lung function, simple [pneumoconiosis] would be very unlikely to contribute to death from pneumonia or any other lung infection or pathophysiologic process." Decision and Order on Remand at 13-14; Director's Exhibit 34. The administrative law judge, within a proper exercise of his discretion, found that the opinions of Drs. Gagon and King were well-reasoned and entitled to greater weight, as both doctors examined the miner in the six months before his death,

and they also reviewed and relied on the final hospitalization records provided by Dr. Potter, the miner's attending physician, as well as their own treatment records, as support for their conclusions. Decision and Order on Remand at 14; *see Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996). Because substantial evidence supports the administrative law judge's determination that the weight of the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), we affirm his findings thereunder, and affirm his award of survivor's benefits.

Lastly, on October 28, 2010, claimant's counsel filed an attorney fee application pursuant to 20 C.F.R. §802.203, with a complete, itemized statement of work performed before the Board in the last appeal of this case. Counsel's attorney fee application requests a total fee of \$2,027.50, representing 11.10 hours of legal services rendered between December 15, 2008 and October 28, 2010, at an hourly rate of \$175.00, and 1.0 hour of paralegal services at an hourly rate of \$85.00. Employer has not submitted any objection to the fee request. We find the requested fee reasonable in light of the services performed, and approve a fee of \$2,027.50, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits in the miner's claim and the survivor'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