

BRB Nos. 09-0321 BLA
and 09-0435 BLA

E.S.)
(Widow of and o/b/o N.S.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 10/13/2009
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in the Miner's Estate Claim and Decision and Order Denying Benefits in the Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in the Miner's Estate Claim and Decision and Order Denying Benefits in the Survivor's Claim of Administrative Law Judge Larry S. Merck rendered on a miner's claim (2007-BLA-

05394) and a survivor's claim¹ (2007-BLA-05395) 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). Initially, the administrative law judge found that this case involves a subsequent miner's claim, filed on December 1, 2003, pursuant to 20 C.F.R. §725.309(d),² and a survivor's claim, filed on January 20, 2005. Adjudicating both claims under 20 C.F.R. Part 718, the administrative law judge found that the miner had

¹ Claimant is the widow of the miner. The miner filed his current claim for benefits on December 1, 2003. The claim was denied by the district director in a Proposed Decision and Order dated August 30, 2004. Director's Exhibits 6, 20. The case was thereafter transferred to the Office of Administrative Law Judges. While his claim was pending before an administrative law judge, the miner died on October 31, 2004. Director's Exhibit 33. By Order dated September 21, 2006, the administrative law judge remanded the miner's claim to the district director for consolidation with the pending survivor's claim, which had been filed by claimant on January 20, 2005. Director's Exhibits 27, 30. Both the miner's claim and the survivor's claim were subsequently forwarded to the Office of Administrative Law Judges, where they were consolidated. Administrative Law Judge Larry S. Merck conducted a formal hearing on April 22, 2008. By Decision and Order dated December 9, 2008, Judge Merck denied benefits on both claims. Claimant appealed to the Board, contesting the denial of benefits in both the miner's claim and the survivor's claim. By letter dated February 6, 2009, the Board inadvertently acknowledged only the appeal of the survivor's claim, BRB No. 09-0321 BLA. By Order dated March 20, 2009, the Board acknowledged the appeal of the miner's claim, BRB No. 09-0435 BLA. These claims have been consolidated for decision.

² The miner filed his first claim for benefits on April 12, 1976. That claim was denied by the district director on August 8, 1979. Director's Exhibit 1. The miner filed a second application for benefits on May 5, 1988, which was denied by the district director because claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718 and, therefore, did not establish a material change in conditions. 20 C.F.R. §725.309 (1988); Director's Exhibit 2. The miner filed a third claim for benefits on March 15, 1990, which was denied by Administrative Law Judge Richard D. Mills on October 13, 1992, who found that the miner failed to establish any of the requisite elements of entitlement under Part 718. Director's Exhibit 3. The Board, in a Decision and Order issued on April 21, 1994, affirmed the denial of benefits. [*N.S.*] *v. Director, OWCP*, BRB No. 93-0421 BLA (Apr. 21, 1994)(unpub.); Director's Exhibit 3. The miner's fourth claim, filed on August 11, 1997, was denied by the district director by reason of abandonment because the miner failed to respond to the district director's Order to Show Cause dated October 9, 1997. Director's Exhibit 4. The miner then filed his current claim on December 1, 2003. Director's Exhibit 6.

two and one-half years of coal mine employment. With respect to the miner's claim, the administrative law judge found that the evidence submitted since the prior denial was insufficient to establish the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(c). The administrative law judge further found that this evidence was insufficient to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), or that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that a change in an applicable condition of entitlement was not established in the miner's claim pursuant to 20 C.F.R. §725.309(d).³ With respect to the survivor's claim, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis and, therefore, found that claimant was unable to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

On appeal in the miner's claim, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) and (4).⁴ Claimant further asserts that the administrative law judge erred in finding that total disability was not established in the miner's claim pursuant to 20 C.F.R. §718.204(b). With respect to the survivor's claim, claimant contends that the administrative law judge erred in failing to find that pneumoconiosis was an underlying factor in the miner's death pursuant to 20 C.F.R. §718.205(c).⁵ The Director, Office of Workers' Compensation Programs (the Director), responds, stating that while the administrative law judge permissibly found that the newly submitted evidence was insufficient to establish pneumoconiosis or total respiratory disability, the denial of benefits in both the miner's and survivor's claims cannot be affirmed. Specifically, the Director concedes that he "has failed to provide the miner with a complete, reasoned medical evaluation as required by Section 413(b) of the Act, 30 U.S.C. [§]923(b)." Director's Response Brief at 4. Consequently, the Director requests that the case be remanded to the district director for further development of the medical

³ Because the miner's previous claim was denied on the ground of abandonment, it is deemed that the miner failed to establish any element of entitlement pursuant to 20 C.F.R. §725.309.

⁴ The administrative law judge's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (3) are affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ We note, based on the Black Lung Benefits Act Evidence Summary Form submitted by claimant, that she is relying on the same evidence to establish entitlement in the miner's claim and the survivor's claim.

evidence.

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.⁶ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In this case, claimant is required to prove, based on the newly submitted evidence, that the miner had pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment in order to have the miner's claim reviewed on the merits. 20 C.F.R. §§725.309(d), 725.409(c).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

At the outset, we reject claimant's argument that the new x-ray evidence establishes the existence of pneumoconiosis at Section 718.202(a)(1). The administrative law judge correctly found that there were no new positive x-ray readings for the existence of pneumoconiosis, as the only newly submitted x-ray, dated February 23, 2004, was read as negative for pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 9; Director's Exhibit 16. Accordingly, we affirm the administrative law judge's finding that the new x-ray evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1) or a change in an applicable condition of entitlement on that basis at Section 725.309(d).

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mining employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 8, 31.

We decline, however, to address claimant's allegations of error at Sections 718.202(a)(4), 718.204(b) and 718.205(c), as the Director concedes that he has not satisfied his obligation to provide a miner, in each new claim, with a complete pulmonary evaluation that addresses all elements of entitlement. The Director concedes that, because Dr. Wicker did not address the issue of legal pneumoconiosis, and because the administrative law judge found Dr. Wicker's opinion on the issue of total disability to be unreasoned, the Department has not provided claimant with a medical opinion that addresses all of the elements of entitlement.⁷ Director's Response Brief at 4.

We agree. The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete and explained:

In the end, the DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, *i.e.*, based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, --- BLR ---, (6th Cir. 2009).

In this case, Dr. Wicker performed the DOL-sponsored pulmonary evaluation on February 23, 2004, which included a physical examination, an x-ray, a pulmonary function study and an arterial blood gas study. Director's Exhibit 16. Dr. Wicker completed Form CM-988 and stated that "I see no evidence of pneumoconiosis" under "Cardiopulmonary Diagnosis (es)" and, with respect to respiratory impairment, the doctor stated that "[t]his individual's respiratory capacity does not appear to be adequate to perform his previous occupation in the coal mining industry possibly secondary to his previous surgery." *Id.* However, Dr. Wicker did not state the bases for these conclusions. *Id.* Because Dr. Wicker has not specifically linked his conclusions to the medical tests he administered and did not provide an opinion regarding the presence or

⁷ Dr. Wicker's opinion was the only new medical opinion.

absence of legal pneumoconiosis, his medical opinion does not satisfy the Director's statutory obligation of providing the miner with a complete pulmonary evaluation that addresses all elements of entitlement. *Greene*, 575 F.3d at 641-42, --- BLR at ---. Consequently, we vacate the administrative law judge's findings and remand this case to the district director to cure the defects in Dr. Wicker's medical report. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Greene*, 575 F.3d at 641-42, --- BLR at ---; see *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990). Accordingly, we vacate the administrative law judge's denial of benefits in the miner's claim. Further, we vacate the administrative law judge's denial of benefits in the survivor's claim, as the administrative law judge's denial of benefits in that claim is predicated on his finding that the existence of pneumoconiosis was not established.⁸

⁸ In view of our disposition of this case, we decline to address any additional contentions of the parties in this appeal. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in the Miner's Estate Claim and Decision and Order Denying Benefits in the Survivor's Claim is vacated, and this case is remanded to the district director to allow for a complete pulmonary evaluation, at no expense to claimant, and for reconsideration of both the miner's claim and the survivor's claim in light of the new evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge