

BRB No. 00-1167 BLA

LYDIA B. HACKNEY)
(Widow of WILLIE O. HACKNEY)

Claimant-Petitioner)

v.)

DATE ISSUED: _____

)
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Sarah M. Hurley (Howard M. Radzely, 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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹, appeals the Decision and Order on Remand - Denial of Benefits (97-BLA-0293) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on a duplicate miner's claim and a survivor's claim filed pursuant to the

¹Claimant is Lydia B. Hackney, surviving spouse of Willie O. Hackney, the miner, who died on October 25, 1995. Director's Exhibits 21, 22. Claimant filed her survivor's claim with the Department of Labor (DOL) on March 22, 1996. Director's Exhibit 21.

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). The case is before the Board for the third time. The administrative law judge assumed that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)(2000), but weighed the x-rays against the negative autopsy report of Dr. Crouch, which he had previously credited at 20 C.F.R. §718.202(a)(2)(2000), and concluded that the totality of the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2000). Accordingly, the administrative law judge denied both claims.

The procedural history of the two claims is as follows: The miner filed his first claim for benefits with both the Social Security Administration (SSA) and the Department of Labor (DOL) on July 9, 1973. Director's Exhibit 18. The miner's 1973 SSA claim was finally denied by SSA on June 29, 1977. *Id.* The miner's 1973 DOL claim was denied by Administrative Law Judge Peter McC. Geisey in a Decision and Order dated July 9, 1987. Following claimant's appeal, the Board remanded the case for the Director to fulfill his statutory obligation of providing the miner with a complete, credible, pulmonary evaluation. *Hackney v. Director, OWCP*, BRB No. 87-2155 BLA (Aug. 31, 1989)(unpub.). Subsequently, Judge Geisey found that the evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)(2000), and total respiratory disability at Section 718.204(c)(2000) in a Decision and Order dated February 21, 1991. The miner took no further action on this claim, and the denial became final. The miner then filed a duplicate claim on February 4, 1993. Director's Exhibit 1. While the claim was pending before the Office of Administrative Law Judges the miner died, and claimant filed a survivor's claim. Following a hearing, the administrative law judge denied both claims in a Decision and Order dated December 28, 1998. Following claimant's appeal, the Board affirmed the administrative law judge's findings that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(4)(2000), but vacated his finding regarding the x-ray evidence at 20 C.F.R. §718.202(a)(1)(2000), and remanded the case. *Hackney v. Director, OWCP*, BRB No. 99-0407 BLA (Feb. 10, 2000)(unpub.). On remand, the administrative law judge assumed that the evidence established the existence of pneumoconiosis at Section 718.202(a)(1)(2000), but found that the autopsy evidence at Section 718.202(a)(2)(2000) outweighed the x-ray evidence in a manner consistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2 - (4th Cir. 2000). Claimant then filed the instant appeal with the Board.

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1)(2000). Claimant asserts that the administrative law judge failed to adhere to the Board's instructions to reweigh the x-ray evidence at Section 718.202(a)(1)(2000). Claimant also argues that the administrative law judge did not give additional weight to

claimant's treating physician and more weight to examining physicians pursuant to Section 718.202(a)(2)(2000). The Director, Office of Workers' Compensation Programs (the Director), in response to claimant's appeal, asserts that the administrative law judge's findings are supported by substantial evidence, and accordingly, the Director urges affirmance of the decision below.²

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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary

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).

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, claimant asserts that the administrative law judge failed to adhere to the Board's instructions on remand. The Board instructed the administrative law judge to reweigh the x-ray evidence at Section 718.202(a)(1)(2000). The Board's decision was issued prior to the Fourth Circuit's opinion in *Compton*. On remand from the Board, the administrative law judge assumed that the x-ray evidence was positive for pneumoconiosis at Section 718.202(a)(1)(2000), but found that the autopsy report of Dr. Crouch, which he previously credited on the basis of Dr. Crouch's superior credentials, outweighed the positive x-ray evidence. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Director's Exhibit 29. The administrative law judge's weighing of the evidence comports with the requirements of *Compton*, which is the current law applicable to the instant case, which arises within the appellate jurisdiction of the Fourth Circuit. The administrative law judge, within his discretion, relied on the autopsy evidence as the most reliable evidence regarding the existence of pneumoconiosis. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1- 688 (1985).

injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Claimant further contends that the administrative law judge did not accord the miner's treating physician due weight and that the administrative law judge improperly accorded non-examining physicians undue weight. These arguments were previously rejected by the Board. *Hackney v. Director, OWCP*, BRB No. 99-0407 BLA (Feb. 10, 2000)(unpub.). Our prior holdings constitute the law of the case and we, therefore, reaffirm them. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1- 988 (1984).

In light of the foregoing, we affirm the administrative law judge's finding that the negative autopsy evidence outweighs the positive x-ray evidence, and therefore, affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(2000). *See* 20 C.F. R. §718.202(a). As this finding precludes an award of benefits in both the miner's claim and the survivor's claim, we affirm the administrative law judge's denial of benefits. *See Trent, supra; Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge