

BRB No. 02-0888 BLA

JO ANNE HIXON)
(Widow of RICHARD HIXON))
)
 Claimant-Petitioner)
)
 v.)
)
 ZEIGLER COAL COMPANY) DATE ISSUED: 09/25/2003
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2000-BLA-376) of Administrative Law Judge Rudolf L. Jansen denying benefits with respect to claims filed by the miner and survivor 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).¹ The

¹The 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

administrative law judge credited the miner with eleven years of qualifying coal mine employment, and based on the date of filing, considered entitlement in both the miner's claim and the survivor's claim pursuant to 20 C.F.R. Part 718.² The administrative law judge determined that the issue before him in the miner's claim was whether claimant had established a mistake of fact or change in conditions pursuant to 20 C.F.R. §725.310 (2000) with respect to the denial of the miner's duplicate claim. The administrative law judge found that claimant failed to establish total disability and total disability due to pneumoconiosis - the elements that had defeated entitlement in the prior denial. The administrative law judge found with respect to the survivor's claim that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), but failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability due to pneumoconiosis, as he did not fully consider the evidence of record pursuant to 20 C.F.R. §718.204(b) and (c). Claimant also argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by the x-ray and medical opinion evidence and in failing to find that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.³

regulations.

²Claimant is Jo Anne Hixon, the miner's widow. The miner, Richard Hixon, filed his initial claim for benefits on January 26, 1988, which was finally denied on April 26, 1988. Director's Exhibit 24. The miner filed a second claim on October 20, 1994, which was denied on March 21, 1997. Director's Exhibits 1, 21, 27. The miner subsequently filed a request for modification, which was finally denied on December 11, 1997. Director's Exhibits 28, 29, 33. The miner died on September 20, 1997 and claimant made a second request for modification in the miner's claim in October, 1998 and also filed a survivor's claim on August 14, 1998. The request for modification and the survivor's claim were denied on December 14, 1999. Director's Exhibits 37, 38, 63. Claimant subsequently requested a hearing on both claims. Director's Exhibits 65, 66.

³The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203 and 718.204(b)(2)(i)-(ii) are affirmed, as they have not been challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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).

With respect to the administrative law judge's determination that claimant failed to establish total disability under Section 718.204(b)(2)(iii) and (iv), claimant asserts that the administrative law judge did not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), when considering the evidence of record. This contention has merit. Under the terms of the APA, each adjudicatory decision must include a statement of "the findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record." *Id.*

In the present case, when addressing the evidence under Section 718.204(b)(2)(iii), the administrative law judge set forth the relevant medical opinion evidence, noting that Dr. Jones, the autopsy prosector, and Drs. Cohen and Green diagnosed cor pulmonale while none of the other six reviewing pathologists found the disease. Decision and Order at 20. The administrative law judge also indicated that Drs. Caffrey and Tuteur specifically addressed Dr. Jones's diagnosis and explained why they disagreed with it. The administrative law judge further noted that all of the physicians whose reports he had reviewed were Board-certified in pulmonary disease or pathology. He then stated that the evidence was "equivocal as it relates to the issue of whether the miner had cor pulmonale" and concluded that claimant did not establish total disability under Section 718.204(b)(2)(iii). *Id.*

With respect to Section 718.204(b)(2)(iv), the administrative law judge found that the evidence did not support a finding that the miner suffered from a totally disabling respiratory or pulmonary impairment. The administrative law judge set forth the physicians' opinions, noted that they were documented and reasoned, and concluded that "the majority of these reasoned opinions do not establish that the miner was disabled due to a respiratory disease or due to pneumoconiosis as defined under 20 C.F.R. §718.204." Decision and Order at 21.

Under Section 718.204(b)(2)(iii) and (iv), the administrative law judge identified the evidence relevant to the issue of total disability, determined that the medical opinions were reasoned and documented, and noted the physicians' qualifications. The administrative law judge did not, however, determine the probative weight to which each physician's opinion was entitled by examining the explanations of their opinions, the

documentation underlying their opinions, and the bases of their diagnoses nor did he attempt to resolve the conflict between the opinions. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).⁴ Because the administrative law judge's consideration of the evidence relevant to Section 718.204(b)(2)(iii) and (iv) does not conform to the requirements of the APA, we must vacate his findings under these sections and remand the case to the administrative law judge to determine whether the evidence is sufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment. When addressing the evidence on remand, the administrative law judge must make a finding as to the probative weight to which the individual medical opinions are entitled, resolve the conflicts between the opinions, and set forth the rationale underlying his findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Claimant also alleges that in holding that entitlement was precluded in the miner's claim pursuant to Section 718.204(c), the administrative law judge did not properly apply the Seventh Circuit's decision in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). In *Vigna*, the court held that if a miner would have been disabled at the same time and to the same extent by conditions other than pneumoconiosis, he is not entitled to benefits under the Act. In the present case, the administrative law judge stated that:

The medical opinions do not controvert the fact that Mr. Hixon was totally disabled before his death due to multiple problems other than pneumoconiosis. Therefore, under *Vigna*, the miner is not entitled to benefits, as the element of causation has not been shown under §718.204 as interpreted by the Seventh Circuit.

Decision and Order at 21. The administrative law judge rendered this finding without determining whether the evidence of record established that claimant became totally disabled by conditions other than pneumoconiosis before he became disabled due to the effects of stroke, diabetes, pneumonia, and colon cancer. Absent this finding of fact, we cannot affirm the administrative law judge's application of the holding in *Vigna*.⁵

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's qualifying coal mine employment occurred in Illinois. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ The miner ceased coal mine employment in 1988. Director's Exhibit 2. He was placed in a nursing home in 1996, primarily due to complications from strokes and diabetes. Director's Exhibit 49. If fully credited, the medical opinions of Drs. Jones, Cohen, Green, and Caffrey could support a determination that the miner became totally

Kennellis Energies v. Director, OWCP [Ray], 333 F.3d 822, BLR (7th Cir. 2003). Thus, we must vacate the administrative law judge's finding relevant to Section 718.204(c). On remand, if the administrative law judge determines that the miner was totally disabled pursuant to Section 718.204(b)(2), he must reconsider his finding regarding the cause of the miner's disability in light of the holding in *Vigna*.

Turning to the administrative law judge's consideration of the survivor's claim, claimant alleges that the administrative law judge did not properly weigh the x-ray evidence under Section 718.202(a)(1), arguing that the administrative law judge miscounted the number of films, neglected narrative readings that were positive for pneumoconiosis, misapplied the principle of progressivity, ignored the fact that the autopsy evidence established the existence of pneumoconiosis, and did not discuss whether the miner had legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2). We decline to address the claimant's arguments concerning the administrative law judge's findings under Section 718.202(a)(1), as the administrative law judge found pneumoconiosis established under Section 718.202(a)(2). See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding the administrative law judge's finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c), claimant contends that the administrative law judge set forth the various opinions but did not comply with the APA in considering the evidence, as he did not examine the bases of the opinions nor did he explain his reasons for crediting or discrediting the opinions as required. Claimant's allegation of error has merit. The administrative law judge identified Drs. Jones, Green, and Cohen as physicians who opined that pneumoconiosis played a role in the miner's death, and Drs. Naeye, Kleinerman, Caffrey, Tuteur, Repsher, and Renn as those who concluded that the disease was too minimal to have caused, contributed to, or hastened the miner's demise. Decision and Order at 24; Director's Exhibits 38, 39, 53, 59; Claimant's Exhibits 1, 2; Employer's Exhibits 1-6, 8. The administrative law judge determined that all of the opinions were well reasoned and stated that even if the opinions of the physicians who linked the miner's death to pneumoconiosis "were given equal probative weight against the six other reviewing physicians, the evidence in support of [claimant] is in equipoise." Decision and Order at 25. Because the administrative law judge did not determine the probative weight to which each physician's opinion was entitled by examining the explanations of their opinions, the documentation underlying

disabled by pneumoconiosis before experiencing the other conditions to which the administrative law judge referred. Decision and Order at 21; Director's Exhibits 39, 59; Claimant's Exhibits 1, 2.

their opinions, and the bases of their diagnoses nor did he attempt to resolve the conflict between the opinions, we must vacate his finding under Section 718.205(c), as it does not conform to the requirements of the APA. *See Wojtowicz*, 12 BLR 1-162; *Hall*, 12 BLR 1-80. On remand, in determining whether claimant has established that either clinical or legal pneumoconiosis caused, contributed to or hastened the miner's death, the administrative law judge must make a finding as to the probative weight to which the individual medical opinions are entitled, resolve the conflicts between the opinions, and set forth the rationale underlying his findings. *Id.*

Accordingly, the administrative law judge's Decision and Order denying benefits in both the miner's and survivor's claims is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge