BRB No. 04-0966 BLA

MILFORD SHORT (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 09/30/2005
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox, Harlan, Kentucky, for claimant.

Martin E. Hall and Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (02-BLA-0330) of Administrative Law Judge Joseph E. Kane awarding 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).[1] This case involves a 1992 duplicate claim.[2] In the initial Decision and Order, Administrative Law Judge Charles P. Rippey found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis. Director's Exhibit 77. Judge Rippey, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* In his consideration of the merits of claimant's 1992 claim, Judge Rippey found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.* However, Judge Rippey found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Rippey denied benefits. *Id.* By Decision and Order dated March 27, 1996, the Board affirmed Judge Rippey's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Short v. Westmoreland Coal* Co., BRB No. 95-2041 BLA (Mar. 27, 1996) (unpublished). The Board, therefore, affirmed Judge Rippey's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim.[3] After noting that the parties stipulated that claimant suffers from pneumoconiosis, Administrative Law Judge Thomas F. Phalen found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Director's Exhibit 121. However, Judge Phalen found that the evidence was insufficient to establish both total disability pursuant to 20 C.F.R.

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[1]The 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 regulations.

[2]Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on June 27, 1973. Director's Exhibit 55. The SSA denied the claim on January 21, 1974 and July 3, 1979. *Id.* The Department of Labor denied the claim on November 21, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on July 15, 1992. Director's Exhibit 1.

[3]Claimant filed a third claim on September 19, 1996. Director's Exhibit 88. Because claimant's 1996 claim was filed within one year of the issuance of the last denial of his 1992 claim, the 1996 claim constituted a timely request for modification of the 1992 claim pursuant to 20 C.F.R. §725.310 (2000). *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990).

§718.204(c)(1)-(4) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Finding the evidence insufficient to establish complicated pneumoconiosis, Judge Phalen also found that claimant was precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304 (2000). *Id.* Accordingly, Judge Phalen denied benefits. *Id.*

By Decision and Order dated September 28, 1999, the Board affirmed Judge Phalen's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000) as unchallenged on appeal.[4] *Short v. Westmoreland Coal* Co., BRB No. 98-1398 BLA (Sept. 28, 1999) (unpublished). However, the Board vacated Judge Phalen's finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) and remanded the case for further consideration. *Id.* The Board also vacated Judge Phalen's finding that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.*

On remand, Judge Phalen reconsidered whether the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000). Director's Exhibit 132. Upon reconsideration, Judge Phalen found that the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000). *Id.* Judge Phalen further found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Id.* Weighing all of the relevant evidence together, Judge Phalen found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Judge Phalen, therefore, found that the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Id.* However, Judge Phalen further found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Accordingly, Judge Phalen denied benefits.

[4]The Board similarly affirmed Administrative Law Judge Thomas F. Phalen's finding that claimant was not entitled to the irrebuttable presumption set out at 20 C.F.R. §718.304 (2000). *Short v. Westmoreland Coal* Co., BRB No. 98-1398 BLA (Sept. 28, 1999) (unpublished).

Claimant filed an appeal and employer filed a cross-appeal[5] with the Board. *See* Director's Exhibits 133, 134. However, claimant subsequently requested that the Board remand the case for consideration of new evidence. Director's Exhibit 144. By Order dated November 9, 2000, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings.[6] *Short v. Westmoreland Coal Co.,* BRB Nos. 00-0925 BLA and 00-0925 BLA-A (Nov. 9, 2000) (Order) (unpublished). Consequently, the Board also dismissed employer's cross-appeal. *Id.*

In a Decision and Order dated September 17, 2004, Administrative Law Judge Joseph E. Kane (the administrative law judge) found that there was not a mistake in a determination of fact in regard to Judge Phalen's previous denial of benefits.[7] 20 C.F.R. §725.310 (2000). However, the administrative law judge found that the newly submitted evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis. The administrative law judge, therefore, found that the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[8] On the merits, the administrative law judge found that the evidence was sufficient to establish that claimant suffered from pneumoconiosis arising out of his coal mine

[5]In its cross-appeal, employer argued that Judge Phalen's *sua sponte* reconsideration of whether the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000) was improper. Director's Exhibit 140. Employer contended that Judge Phalen's reconsideration of the pulmonary function study evidence violated the law of the case doctrine and principles of collateral estoppel.

[6]The Board informed claimant that his appeal would be reinstated only if he requested reinstatement. *Short v. Westmoreland Coal Co.,* BRB Nos. 00-0925 BLA and 00-0925 BLA-A (Nov. 9, 2000) (Order) (unpublished). The Board further informed claimant that his request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number, BRB No. 00-0925 BLA. *Id.*

[7]Claimant died on May 10, 2002. *See* Claimant's Exhibit 1. Claimant's claim is being pursued by his widow, Wilma Short.

[8]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001. Similarly, the evidentiary limitations set forth at 20 C.F.R. §725.414 do not apply to this claim because it was filed before the effective date of the revised regulations. 20 C.F.R. §725.2(c).

employment. The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis. Claimant's widow responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[9]

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant must establish that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

[9]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

20 C.F.R. §718.204(c)(1).

In his consideration of whether the evidence was sufficient to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis, the administrative law judge credited Dr. Greenfield's opinion that claimant's totally disabling respiratory impairment was due to pneumoconiosis, over the contrary opinions of Drs. Dahhan, Loudon, Castle, Fino and Jarboe.[10] Decision and Order at 13; Director's Exhibit 145; Employer's Exhibits 5, 6, 9, 10, 12, 16. The administrative law judge, therefore, found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis. *Id.*

Employer contends that the administrative law judge committed numerous errors in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis. Employer initially argues that the administrative law judge erred in his consideration of Dr. Greenfield's opinion. In an affidavit dated September 5, 2000, Dr. Greenfield, claimant's treating physician, opined that claimant was totally disabled due to coal workers' pneumoconiosis. Director's Exhibit 145. The administrative law judge initially found that Dr. Greenfield's opinion was weakened by the fact that the doctor opined that claimant's lung cancer was attributable to coal dust exposure, a finding the administrative law judge noted was "clearly and totally contradicted" by the other medical evidence of record. Decision and Order at 13. However, the administrative law judge found that Dr. Greenfield's opinion as to the cause of claimant's pulmonary impairment was strengthened by two factors: (1) Dr. Caffrey's statement that the amount of coal workers' pneumoconiosis present was severe enough to cause pulmonary disability; and (2) Dr. Ally's finding on autopsy of macronodules 1 to 3 centimeters in size. *Id.*

We agree with employer that the administrative law judge erred in finding that Dr. Greenfield's opinion was strengthened by Dr. Caffrey's opinion. Dr. Caffrey, a Board-certified pathologist, reviewed claimant's autopsy slides and the medical evidence. In a November 25, 2002 report, Dr. Caffrey opined that he was unable to determine whether any impairment was due to claimant's coal workers' pneumoconiosis. Employer's Exhibit 3. During a January 16, 2003 deposition, Dr. Caffrey explained why he was unable to make such a determination:

[10]Two additional physicians addressed the cause of claimant's pulmonary impairment. Dr. Caffrey opined that he was unable to determine whether any of claimant's impairment was due to pneumoconiosis. Employer's Exhibits 3, 8. Although Dr. Castle could not exclude the possibility that claimant's pneumoconiosis might have contributed to his obstructive abnormality, he noted that any such contribution would be *de minimus*. Employer's Exhibit 7 at 16-17.

> I'm a pathologist, and I believe I'm an expert in the field of pathology. I am not a pulmonologist, and I believe my opinion would be much more subjective, and not being an expert in the field of pulmonary medicine, I would opt to defer any opinion I have to the pulmonologist.

Employer's Exhibit 8 at 16-17.

Consequently, because Dr. Caffrey indicated that he was unable to determine whether any of claimant's impairment was due to his pneumoconiosis, the administrative law judge erred in finding that Dr. Greenfield's opinion was supported by that of Dr. Caffrey. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

The administrative law judge also erred in according greater weight to Dr. Greenfield's opinion based upon Dr. Ally's finding of macronodules, during claimant's autopsy. In his "internal examination" of claimant's lungs, Dr. Ally, the autopsy prosector, noted that "[s]erial cross sectioning show[ed] focal areas of indurated rubbery black areas resembling macronodules which vary from 1 to 3 cm. in maximum dimension."[11] Claimant's Exhibit 1. Although Dr. Ally's final anatomic diagnoses included bilateral, macronodular coal workers' pneumoconiosis, the doctor did not address whether or not claimant suffered from a totally disabling respiratory or pulmonary impairment or whether any such impairment was attributable to his pneumoconiosis. *Id.* The administrative law judge erred in failing to provide any explanation for his finding that Dr. Ally's autopsy findings supported Dr. Greenfield's opinion that claimant's total disability was due to pneumoconiosis.[12] 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also argues that the administrative law judge erred in his consideration of the opinions of Drs. Dahhan, Loudon, Fino, Jarboe, Caffrey and Castle. The administrative law judge found that "other physicians" who concluded that claimant's

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[11]The administrative law judge found that claimant was not entitled to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Decision and Order at 12. Because no party challenges this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[12]The administrative law judge also erred in not addressing whether Dr. Greenfield's opinion regarding the cause of claimant's pulmonary impairment is sufficiently documented and reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

totally disabling respiratory or pulmonary impairment was due to bronchial asthma based their findings "on the note in one report from the 1950's that the miner had asthma at age 10." Decision and Order at 13. The administrative law judge noted that there was no support in the current treatment records or hospital reports for a diagnosis of bronchial asthma. *Id.* Although the administrative law judge acknowledged that these physicians supported their opinions with pulmonary function test results, he found that their findings were "not so persuasive in light of the minimal and remote mention of asthma in the miner's medical records." *Id.*

Drs. Dahhan, Castle, Fino and Jarboe attributed claimant's respiratory impairment to asthma. Employer's Exhibits 4, 6, 7, 9, 10, 12, 15. In doing so, none of these physicians based his opinion solely upon a note in a 1950's medical report that claimant suffered from asthma. Each of these physicians provided a detailed explanation for finding that claimant's pulmonary impairment was attributable to asthma. The administrative law judge erred in not addressing the reasoning underlying their opinions.

The administrative law judge further erred in finding that the opinions of Drs. Dahhan, Loudon, Fino, and Jarboe were called into question by the fact that they failed to discuss the pathological findings by Drs. Ally and Caffrey of nodules 1 to 3 centimeters in size, or the findings by Drs. Ally and Caffrey of moderately severe simple coal workers' pneumoconiosis. The administrative law judge did not cite any medical opinion evidence in support of his conclusion that this evidence was significant in regard to determining the etiology of claimant's disabling respiratory or pulmonary impairment.[13] By inferring that a finding of nodules ranging in size from 1 to 3 centimeters, and a finding of moderately severe pneumoconiosis supported a finding that claimant's totally disabling pulmonary impairment was attributable to pneumoconiosis, the administrative law judge improperly substituted his opinion for that of the medical experts.[14] *See generally Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Finally, the administrative law judge discredited Dr. Castle's opinion, that any contribution that claimant's pneumoconiosis may have made to his pulmonary impairment was *de minimus*, because the doctor failed to discuss the severity of the pneumoconiosis found on autopsy. Again, the administrative law judge improperly

[13]Notably, neither Dr. Ally nor Dr. Caffrey opined that claimant's pulmonary disability was attributable to his coal workers' pneumoconiosis. As previously noted, Dr. Ally did not address the issue and Dr. Caffrey, a pathologist, indicated that he would defer on this issue to a pulmonologist.

[14]Dr. Caffrey opined that the fact that a miner suffers from severe coal workers' pneumoconiosis does not necessarily equate to a finding of moderately severe impairment. Employer's Exhibit 8 at 12.

substituted his opinion for that of a medical expert. Dr. Castle reviewed claimant's autopsy report. The significance of the autopsy findings is an issue for the doctor to determine, not the administrative law judge. *Marcum*, *supra*.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration. *See Adams*, *supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge