

BRB No. 91-0840 BLA

BERTHA LUCILLE HELM)
(Widow of HARTLEY HELM))
)
Claimant-Respondent)
)
v.)
) FREEMAN UNITED COAL MINING)
COMPANY) DATE ISSUED:
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Revised Decision and Order of Charles W. Campbell,
Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Karin T. O'Connell (Gould & Ratner), Chicago, Illinois, for employer.

Russell A. Shultis (Thomas S. Williamson, Jr., 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: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Revised Decision and Order (84-BLA-2889)

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

of Administrative Law Judge Charles W. Campbell, Jr., 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). This case is before the Board for the second time. The miner filed a claim for benefits on April 21, 1978, which was denied by the Department of Labor (DOL) on December 18, 1980. The miner filed a second claim on January 10, 1983, which was denied by DOL on February 8, 1983. Subsequent to the miner's death on March 15, 1983, claimant, the miner's widow filed a survivor's claim on August 6, 1983. Upon considering the claims, the administrative law judge credited claimant with at least thirty years of coal mine employment and determined that the miner's 1978 claim was abandoned and that the miner's 1983 claim and the survivor's claim were still pending. The administrative law judge then awarded benefits on the miner's claim pursuant to 20 C.F.R. Part 718 and found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were awarded on both claims. On appeal, the Board affirmed the administrative law judge's finding that the miner's 1978 claim was abandoned and, regarding the miner's claim, vacated the administrative law judge's finding according determinative weight to Dr. Corder's report. The Board therefore remanded the case for further consideration of the medical opinion and contrary probative evidence pursuant to 20 C.F.R. §718.204 and for a discussion of the miner's duties in regards to his total disability. As to the survivor's claim, the Board vacated the administrative law judge's findings at 20 C.F.R. §718.205 and remanded the case for the administrative law judge to further discuss his weighing of the opinions of Drs. Long, Corder, Hansbarger and Sugar. The Board also affirmed the administrative law judge's finding that claimant was able to pursue the miner's claim after his death because of her own pecuniary interest. *See Helm v. Freeman United Coal Mining Co.*, BRB No. 87-800 BLA (Mar. 30, 1990)(unpub.). On remand, the administrative law judge found that claimant established forty-nine years of coal mine employment; that the miner had pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b); that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c)(4); and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in weighing the evidence of record and argues that the award of benefits is barred by the principles of *res judicata* and collateral estoppel. Claimant responds in support of the administrative law judge's Decision and Order and the Director, Office of Workers' Compensation Programs (the Director), responds stating that employer's *res judicata* argument is now moot.

The Board's scope of review is defined by statute. The administrative law

judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

Initially, in regard to the miner's claim, employer contends that the administrative law judge erred in crediting Dr. Corder's report solely because he was the miner's treating physician and that Dr. Corder's report is unsubstantiated and unreasoned. However, the administrative law judge permissibly accorded greater weight to Dr. Corder's opinions that the miner was totally disabled due to pulmonary emphysema which was caused by his coal mine employment and that the pneumoconiosis was a contributing cause to his death, because he was the miner's treating physician. See Director's Exhibits 20, 26, 61; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge further noted that Dr. Corder was familiar with the miner's work and medical histories and had performed physical examinations of the miner's heart and lungs on several occasions. See Decision and Order at 8. Employer's contention of error on this issue is therefore rejected.

Employer next contends that the administrative law judge erred in drawing his own conclusions regarding the degree to which certain blood gas study values impair a miner, instead of relying on the values set forth in the regulations. Upon considering the blood gas study evidence, the administrative law judge properly stated that the non-qualifying blood gas study of February 1, 1983 does not by itself support a finding of total disability, but that it also does not necessarily preclude such a finding. See Decision and Order at 6. The administrative law judge, however, properly considered the non-qualifying blood gas study along with the other evidence of record in making his total disability findings. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988).

Employer's last contention of error as to the miner's claim was that the administrative law judge's review of the miner's job duties was insufficient. However, the administrative law judge permissibly considered the evidence of record and the testimony given at the hearing in drawing his conclusions concerning the miner's ability to perform his usual job duties. See Decision and Order at 7-8; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). As a result, the administrative law judge's finding that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204 and his award of benefits in the miner's claim are affirmed.

Regarding the survivor's claim, employer contends that the administrative law judge erred in crediting Dr. Long's report as it is not reasoned, and that the

administrative law judge erred in giving reduced weight to the opinions of Drs. Hansbarger and Sugar because they did not examine the miner. Upon considering these opinions, the administrative law judge permissibly accorded the opinions of Drs. Long, Hansbarger, and Sugar reduced weight because they never had the opportunity to see the miner while he was alive or examine him in person. See Decision and Order at 3; *Onderko, supra*. The administrative law judge also discussed each of these opinions individually. In discussing Dr. Hansbarger's opinion that the miner's pneumoconiosis did not contribute to his demise, either on a primary or secondary basis, the administrative law judge stated that, although Dr. Hansbarger examined autopsy slides, his opinion with respect to the severity of the miner's pulmonary emphysema differed from that of Dr. Katubig, the pathologist who was the original prosector. Dr. Hansbarger diagnosed mild emphysema while Dr. Katubig found marked pulmonary emphysema. See Decision and Order at 3; Director's Exhibits 36, 62. The administrative law judge permissibly accorded Dr. Katubig's opinion greater weight than that of Dr. Hansbarger, as Dr. Katubig is the original prosector and his opinion is more in accordance with that of the physicians who were able to observe the miner from a clinical standpoint while he was alive. See *Hawkins v. Peabody Coal Co.*, 11 BLR 1-157 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985).

The administrative law judge permissibly stated that Dr. Long's opinion, that the miner's coal workers' pneumoconiosis was a significant contributing factor in his death, deserved some weight because, although she did not examine the miner in person the physician reviewed Dr. Corder's September 20, 1983 letter, the latest pulmonary function study, and presumably the autopsy report in making her findings. Thus, she had more complete information on the miner's condition. See *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). The administrative law judge also noted that Dr. Long is an independent reviewer for the Department of Labor, which suggests impartiality. See Decision and Order at 3-4; Director's Exhibit 65; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); Mabe, *supra*.

In addition to according Dr. Sugar's opinion less weight because he did not examine the miner, the administrative law judge also permissibly gave this opinion less weight because the record does not show the medically relevant data on which he relied. See *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984).

The administrative law judge also interpreted Dr. Sugar's statement that if someone has symptomatic coal workers' pneumoconiosis then one will have restrictive findings and progressive massive pulmonary fibrosis, to indicate an opinion by the physician that only individuals with progressive massive fibrosis have symptoms attributable to pneumoconiosis, and thus that simple coal workers' pneumoconiosis can never result in symptoms. The administrative law judge permissibly concluded that such an opinion "would contravene the Act's premise that simple

pneumoconiosis may be disabling, and therefore taints his opinion to some extent." See Decision and Order at 4; Employer's Exhibit 2; *Mabe, supra*. As a result, the administrative law judge's weighing of the evidence and his finding that claimant has established entitlement pursuant to 20 C.F.R. §718.205 are affirmed.

Employer's next contends that the award of benefits is barred by the principles of *res judicata* and collateral estoppel because benefits were denied to claimant on a state worker's compensation claim. As the Director notes, employer's argument that the decision of the Illinois Circuit Court is entitled to preclusive effect in claimant's black lung case is moot as the Illinois Appellate Court reversed the Circuit Court's decision on February 5, 1992. See Attachment to Director's Brief. Employer's contention of error on this issue is therefore rejected.

Accordingly, the administrative law judge's Revised Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge