

BRB No. 04-0789 BLA

BERNARD SOKOLOSKI)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 04/15/2005
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Helen H. Cox (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order-Denying Benefits (03-BLA-5979) of Administrative Law Judge Stephen L. Purcell on a subsequent claim² filed pursuant to the

¹ Claimant was the miner, Bernard Sokoloski, who died on January 22, 2004, while his claim was pending. Consequently, the miner's widow, Genevieve Sokoloski, is pursuing the claim on his behalf.

² Claimant's first claim, filed on October 24, 1975, was denied by Administrative Law Judge George A. Fath. Director's Exhibit 18. Judge Fath, in a Decision and Order issued on November 22, 1985, credited claimant with three and one-quarter years of coal

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).³ In considering the subsequent claim, the administrative law judge found no basis to alter the prior finding that claimant established three and one-quarter years of coal mine employment, and noted that in the prior claims the administrative law judges found that claimant established the existence of pneumoconiosis arising out of coal mine employment and that claimant was totally disabled. Decision and Order-Denying Benefits at 3. The administrative law judge noted further that because in the most recent prior denial the Board affirmed the finding that claimant did not establish total disability due to pneumoconiosis, evidence of claimant's condition after the prior denial would be considered to determine if claimant established

mine employment and found that the evidence was sufficient to establish the existence of pneumoconiosis and total disability, but failed to establish that claimant's pneumoconiosis arose out of coal mine employment or that his total disability was due to pneumoconiosis. *Id.* Claimant took no further action on this claim. On February 12, 1991, claimant filed a second claim that was denied by Administrative Law Judge Robert D. Kaplan. Director's Exhibit 19. Judge Kaplan accepted the concession of the Director, Office of Workers' Compensation Programs (the Director) as to the existence of pneumoconiosis. *Id.* Judge Kaplan further found the evidence sufficient to establish that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), thus establishing a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), but denied benefits because the evidence did not establish total disability or disability causation pursuant to 20 C.F.R. §718.204(b),(c) (2000). *Id.* The Board affirmed the denial of benefits. *Sokoloski v. Director, OWCP*, BRB No. 94-0931 BLA (May 30, 1995) (unpub.). Claimant took no further action until he filed a third claim on August 28, 1997. Director's Exhibit 1. In considering the duplicate claim, Administrative Law Judge Ainsworth H. Brown found that claimant failed to establish a material change in conditions as he failed to establish either a totally disabling respiratory impairment or disability causation pursuant to 20 C.F.R. §§725.309(d) (2000), 718.204 (b), (c) (2000). *Id.* The Board held that as Judge Brown properly found that claimant failed to establish disability causation, the Board need not address claimant's other arguments and affirmed the denial of benefits. *Sokoloski v. Director, OWCP*, BRB No. 00-0143 BLA (Dec. 8, 2000) (unpub.). Claimant filed his fourth and present claim on April 22, 2002. Director's Exhibit 3.

³ 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.

total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). *Id.* The administrative law judge did not address whether claimant had a totally disabling respiratory impairment under 20 C.F.R. §718.204(b).

The administrative law judge found the opinion of Dr. Dumas, the only new evidence regarding the cause of the miner's disability submitted with this subsequent claim, to be insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that this subsequent claim must be denied on the basis of the prior denial pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that on consideration of all the evidence, the claim must be denied on the merits because the evidence did not establish total disability due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish a "material change in condition" and total disability due to pneumoconiosis pursuant to Sections 725.309(d) and 718.204(c). Claimant's Brief at 5. Claimant contends that Dr. Dumas' medical opinion established total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), concedes that Dr. Dumas' medical opinion establishes that any respiratory disability claimant may have had was due to pneumoconiosis pursuant to Section 718.204(c)(1). However, the Director urges the Board to vacate the administrative law judge's denial of benefits and remand the case for the administrative law judge to consider whether claimant had a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(1). The Director further contends that if on remand the administrative law judge determines that Dr. Dumas either failed to clearly address total respiratory disability, or that his opinion is not credible because it is not reasoned or documented, then the record should be reopened to obtain a clarification from the doctor or alternatively, the administrative law judge may remand the claim to the district director to develop such evidence pursuant to 20 C.F.R. §725.456(e).⁴

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).

⁴ We affirm, as unchallenged, the administrative law judge's finding that claimant established three and one-quarter years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.204(c)(1), claimant and the Director contend that the administrative law judge erred in finding Dr. Dumas' opinion insufficient to establish that claimant's pneumoconiosis was a substantially contributing cause of total disability. Claimant's Brief at 7-10; Director's Motion to Remand at 5. Dr. Dumas examined claimant on behalf of the Department of Labor on August 2, 2002. Director's Exhibit 7. Dr. Dumas diagnosed pneumoconiosis due to coal mine employment, "COPD" due to smoking, and coronary artery disease of "multi-factorial" etiology. Director's Exhibit 7 at 4. Dr. Dumas stated that "due to COPD, pneumoconiosis and CAD, Mr. Sokoloski is not able to perform his last coal mining job" *Id.* Dr. Dumas specified that pneumoconiosis contributed 10% to claimant's impairment, "COPD" 50%, "CAD" 10%, and that "back surgery, 1958, HNP," contributed 30%. *Id.* The administrative law judge found Dr. Dumas' opinion that 10% of claimant's respiratory impairment was due to pneumoconiosis to be well reasoned and documented, but concluded that it was insufficient to establish that pneumoconiosis was a "substantially contributing cause" of claimant's total disability pursuant to Section 718.204(c)(1).

On appeal, however, the "Director concedes that Dr. Dumas' opinion credibly establishes that [claimant's] pneumoconiosis had a materially adverse effect or was a substantially contributing cause of his combined respiratory impairment." Director's Motion to Remand at 5. The Director requests a remand for the administrative law judge to determine whether claimant's respiratory impairment was totally disabling pursuant to Section 718.204(b). Claimant has not opposed the Director's Motion to Remand.

In light of the Director's concession that Dr. Dumas' opinion establishes that "any respiratory disability [claimant] had was substantially related to pneumoconiosis" pursuant to Section 718.204(c)(1), Director's Motion to Remand at 2, we vacate in part the administrative law judge's Decision and Order-Denying Benefits and remand this case for the administrative law judge to consider whether the record establishes that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). *See* 20 C.F.R. §725.309(d)(4); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318, 20 BLR 2-76, 2-96 (3d Cir. 1995). The Director states that if on remand the administrative law judge finds that Dr. Dumas' report does not clearly address total respiratory disability or that his opinion is not credible, the record should be reopened to obtain a supplemental opinion from the doctor to clarify whether claimant had a totally disabling respiratory impairment, or the administrative law judge could remand the case to the district director to develop such evidence. 20 C.F.R. §725.456(e); Director's Motion to Remand at 7. We note that the administrative law judge on remand has the discretion to reopen the record. *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989)(*en banc*).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge