BRB Nos. 11-0513 BLA and
11-0514 BLA

WILMA WILLIAMSON (Widow of EARL WILLIAMSON)	)	
Claimant-Petitioner	)	
v.	)	
ROBERT COAL COMPANY	)	DATE ISSUED: 04/19/2012
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 on Remand Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand Denial of Benefits (2005-BLA-06056 and 2006-BLA-05944) of Administrative Law Judge Daniel F. Solomon, with respect to a miner's claim and a survivor's claim filed pursuant to the provisions of

[1] Claimant is the widow of the miner, Earl Williamson, who died on June 25, 2005. Director's Exhibit 58.

the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for a second time.[3] The Board previously vacated the administrative law judge's award of benefits in both claims, and held that the administrative law judge erred in failing to explain why he apparently found diagnoses of anthracosis and fibrosis in the miner's lymph nodes, rendered by Dr. Gruetter, to be sufficient to establish the existence of clinical pneumoconiosis[4] pursuant at 20 C.F.R. §718.202(a)(2). *Williamson v. Robert Coal Co.*, BRB Nos. 09-0408 BLA and 09-0416 BLA, slip op. at 6 (Feb. 26, 2010) (unpub.) The Board also held that the administrative

[2] The amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). The amendments do not apply to the miner's claim, as it was filed before January 1, 2005.

[3] The miner filed his initial claim for benefits on September 19, 1988, which was denied by the district director on September 5, 1989, because the miner did not establish any element of entitlement. Director's Exhibit 1. The miner filed a subsequent claim for benefits on August 6, 2004. Director's Exhibit 3. The district director determined that, although the miner established that he had pneumoconiosis, he did not prove that he was totally disabled. Director's Exhibit 38. The miner requested a hearing but died prior to the district director acting on his request. Director's Exhibits 39, 58. Claimant then filed a claim for survivor's benefits on September 12, 2005. Director's Exhibit 49. The district director issued an initial finding of entitlement and employer requested a hearing. Director's Exhibits 86, 87. Prior to the hearing, the administrative law judge granted the parties' request to remand the survivor's claim to the district director for consolidation with the miner's claim. A hearing on the consolidated claims was held on August 8, 2008.

[4] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

law judge did not provide an adequate rationale for according greater weight to Dr. Dennis's autopsy report, based upon his status as the autopsy prosector. *Id*. at 8. Because the administrative law judge relied upon his findings at 20 C.F.R. §718.202(a)(2) when weighing the medical opinions at 20 C.F.R. §718.202(a)(4), the Board also vacated his determination that the existence of clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(4). *Id*. at 8. With respect to the issue of total disability, the Board vacated the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iii) and (iv), as he did not determine whether the evidence established that the miner suffered from right-sided congestive heart failure, in addition to cor pulmonale, and did not adequately consider whether Drs. Musgrave, King, Rosenberg and Vuskovich rendered reasoned and documented diagnoses of total disability. *Id*. at 12-13.

In the survivor's claim, the Board vacated the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2), (3), 718.203(c) and death due to pneumoconiosis at 20 C.F.R. §718.205(c). *Williamson*, slip op. at 17-19. The Board held that the administrative law judge primarily relied on the vacated findings in the miner's claim and did not apply the appropriate standard in determining that the miner's death was due to pneumoconiosis. *Id*. at 19. Accordingly, the Board vacated the award of benefits in both claims and remanded the case for further consideration.[5] *Id*. at 21.

On remand, the administrative law judge found, in both the miner's claim and the survivor's claim, that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), because he could not conclude that the diagnoses of anthracosis and fibrosis in the miner's lymph nodes constituted diagnoses of clinical pneumoconiosis under 20 C.F.R. §718.201(a)(1). The administrative law judge also found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as the medical opinions upon which claimant relied were not well-reasoned or well-documented. The administrative law judge further found that total disability was not established in the miner's claim at 20 C.F.R. §718.204(b)(2)(iii), (iv), as there was no diagnosis of right-sided congestive heart failure in the record and the medical opinions diagnosing total disability were not adequately reasoned and documented. In the survivor's claim, the administrative law judge found that claimant did not prove that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) or that the derivative

[5] The Board affirmed, as unchallenged on appeal, the administrative law judge's determinations that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (3), or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), in either claim, and did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), in the miner's claim. *Williamson v. Robert Coal Co.*, BRB Nos. 09-0408 BLA and 09-0416 BLA, slip op. at 2 n.1 (Feb. 26, 2010)(unpub.).

entitlement provision of Section 1556 of the Patient Protection and Affordable Care Act was applicable. Thus, the administrative law judge denied benefits in both claims.

On appeal, claimant primarily argues that the administrative law judge's initial Decision and Order awarding benefits should be reinstated and affirmed. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[6] 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).

In order to establish entitlement to benefits in the miner's claim, pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, where the presumption in amended Section 411(c)(4) is not available, death will be considered due to pneumoconiosis if claimant establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement.

[6] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27.

Claimant asserts the following on appeal:

> The Claimant feels that the Administrative Law Judge was correct in his first Decision issued on January 30, 2009, and feels this Decision should be reinstated.
>
> Further argument by the Claimant's attorney in this Brief is with reference to the Decision and Order Award of Benefits issued on January 30, 2009, and argues that Decision should be reinstated and AFFIRMED.

Claimant's Petition for Review and Brief in Support at 13. In accordance with these assertions, the bulk of claimant's brief consists of statements supporting her contention that the Board should have affirmed the administrative law judge's initial award of benefits. However, the holdings rendered by the Board in its prior decision now constitute the law of the case. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000)(en banc)(Hall, J. and Nelson, J., concurring and dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Because claimant has not demonstrated that the Board's holdings were erroneous, or established any exception to the law of the case doctrine, we will not disturb them. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Stewart*, 22 BLR at 1-89.

Furthermore, the Board's circumscribed scope of review requires that the party challenging a Decision and Order below address that Decision and Order with specificity, identifying any errors made by the administrative law judge and citing evidence and legal authority that support these allegations. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). In the present case, claimant's sole arguments regarding the administrative law judge's Decision and Order on Remand are that the administrative law judge erred in ignoring Dr. DeLara's *autopsy* report and in declining to give more weight to the opinions of the miner's treating physicians. These contentions are without merit.

The record reflects that claimant submitted a March 27, 2006 letter from Dr. DeLara, based on his review of the miner's autopsy slides and "accompanying medical documents." Claimant's Exhibit 1. This letter was designated by claimant as a *medical* report on her Evidence Summary Form. Because claimant did not designate Dr. DeLara's March 27, 2006 letter as an *autopsy* report, and did not previously object to the treatment of this evidence before the administrative law judge, she cannot now claim that the administrative law judge erred by not weighing Dr. DeLara's report in his

consideration of the autopsy evidence at 20 C.F.R. §718.202(a)(2). *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

Regarding the administrative law judge's consideration of the opinions of the miner's treating physicians, the United States Court of Appeals for the Sixth Circuit has held that an administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003); *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003). In this case, the administrative law judge determined on remand that the opinions of Drs. Musgrave and King were insufficient to establish the requisite elements of entitlement in either claim, as they were not supported by the objective evidence of record. Decision and Order on Remand at 6-10. We affirm the administrative law judge's findings, as claimant has not challenged them on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We also affirm, as unchallenged on appeal, the administrative law judge's findings, on remand, that claimant did not establish the existence of clinical or legal pneumoconiosis under 20 C.F.R. §718.202(a)(2), (4), in either the miner's claim or the survivor's claim, total disability due to pneumoconiosis under 20 C.F.R. §718.204(b), (c), in the miner's claim, or death due to pneumoconiosis under 20 C.F.R. §718.205(c) in the survivor's claim. Because we have affirmed the administrative law judge's determination that claimant failed to demonstrate the necessary elements of entitlement in both the miner's claim and the survivor's claim, we must affirm the denial of benefits in both claims.[7] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[7] In light of our affirmance of the administrative law judge's finding that claimant did not establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2), claimant can not invoke the rebuttable presumption of death due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4).

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

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