BRB No. 99-1110 BLA

LOTTIE OWENS)
(Widow of ELMER L. OWENS))
)
Claimant-Respondent)
)
v.)
)
HARMAN MINING COMPANY,) DATE ISSUED:
INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE)
COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

Dorothy L. Page (Henry L. Solano, 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 BROWN, Administrative Appeals Judges, and NELSON,

Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Awarding Benefits (98-BLA-1337) of Administrative Law Judge Richard A. Morgan (the administrative law judge) on a miner's claim[1] 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). The administrative law judge found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(4), and thereby established a mistake in a determination of fact and was entitled to modification of the prior denial.[2] Decision and Order at 18-19. The administrative law judge further

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[1]The autopsy indicates that the miner died on July 3, 1998, and lists the following diagnoses: acute pneumonia of left lower lobe; lung cancer arising in bronchus of lower left lobe (surgical number S98-283); arteriosclerotic heart disease with narrowing of coronary arteries; clinically urinary retention and acute gastritis with suspected dehydration; coal workers' pneumoconiosis, moderate to moderately severe. Employer's Exhibit 5.

[2]The miner filed this claim in September 1981. Director's Exhibit 1. He testified at the hearing before Administrative Law Judge Robert M. Glennon that he had suffered a cerebral aneurysm in May 1981 and was unable to continue his coal mine employment. Hrg. Tr. at 11, 12, 15, 16. Judge Glennon credited the miner with 24 years of coal mine employment, and found that the miner established occupational pneumoconiosis but failed to establish total disability under 20 C.F.R. Part 718. Accordingly, benefits were denied. Director's Exhibit 40. The miner sought modification. Administrative Law Judge Clement J. Kichuk found that the miner established a change in conditions under 20 C.F.R. §725.310 by establishing total disability at 20 C.F.R. §718.204(c)(2) and (c)(4). He denied benefits based on his finding that employer established rebuttal of the presumption provided at 20 C.F.R. §718.305 by demonstrating that the miner did not have pneumoconiosis and was not totally disabled due to pneumoconiosis. Director's Exhibit 86. The miner appealed. The Board upheld Judge Kichuk's finding on modification, vacated his findings on the merits and his finding of no entitlement, and remanded the case for consideration of the merits of the claim. *Owens v. Harman Mining Corp.,* BRB No. 92-1963 BLA (Mar. 10, 1994)(unpub.); Director's Exhibit 98. On remand, Judge Kichuk denied benefits as he found that the miner failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. (He determined that the miner's respiratory disability was due to smoking and not to pneumoconiosis.) Director's Exhibit 102.

determined that claimant established the requisite etiology at 20 C.F.R. §718.203 and total disability at 20 C.F.R. §718.204(c)(1) and (c)(4), and that employer failed to establish rebuttal of the presumption provided at 20 C.F.R. §718.305(a). With regard to the onset issue, the administrative law judge determined, "Because no specific onset date of disability is evident from the record, benefits will commence on September 1, 1981, the first day of the month in which the miner filed his claim. [20 C.F.R.] §725.503(b)." Decision and Order at 24. The administrative law judge further found that claimant, as the miner's widow, was entitled to survivor's benefits by virtue of his award of benefits in the instant claim. Accordingly, benefits were awarded.

The miner appealed. The Board vacated Judge Kichuk's findings at 20 C.F.R. §§718.202(a)(1), (a)(2) and 718.204(b) and remanded the case for reconsideration. *Owens v. Harman Mining Corp.,* BRB No. 96-0310 BLA (Apr. 29, 1996)(unpub.); Director's Exhibit 110. In a decision which issued on September 18, 1996, Judge Kichuk denied benefits. He found that the miner failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis, and that employer established rebuttal at Section 718.305. Director's Exhibit 111. The miner sought modification on March 31, 1997. Director's Exhibit 112. Subsequent to the miner's death, claimant, the miner's widow, pursued the instant claim.

On appeal, employer contends that the administrative law judge erred in finding a mistake in a determination of fact based on the showing of the existence of pneumoconiosis, inasmuch as Judge Glennon's *original* Decision and Order, as opposed to Judge Kichuk's most recent denial, found the existence of the disease established. *See* discussion *supra* at n.2; Director's Exhibit 40. With regard to the cause of claimant's total disability, employer further contends that the administrative law judge failed to consider the import of the uncontested fact that the miner's 1981 cerebral aneurysm disabled him from further gainful employment. Employer argues that the miner is not entitled to benefits because he was totally disabled due to his cerebral aneurysm, a non-pulmonary condition, before he became totally disabled due to a respiratory condition. Employer also contends that the administrative law judge erred in weighing the evidence on rebuttal at Section 718.305, and failed to consider relevant evidence in determining the date of onset. Employer thus urges the Board to reverse the decision below or, alternatively, to remand the case.[3] Claimant responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), responds, and asserts that a miner who has a totally disabling respiratory impairment due to pneumoconiosis is entitled to benefits under the Act even if he is also disabled by a preexisting non-pulmonary condition. The Director thus argues that the Board should reject employer's argument to the contrary.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer concedes that the administrative law judge properly found the existence of pneumoconiosis based on the newly submitted biopsy and autopsy

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[3]In its original appellate brief, employer argued that the instant second request for modification is time barred as a matter of law as it was filed more than one year after Judge Glennon's original denial. In its reply brief, employer concedes that its argument fails in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999)(modification is available within a year of each rejection of a claim). Employer concedes that *Stanley* is controlling. In light of *Stanley,* and employer's concession, we do not further address this argument or the parties' responses thereto.

evidence. Employer's Brief at 22.[4] Employer argues, however, that the administrative law judge erred in finding that claimant thereby established a mistake in a determination of fact. Specifically, employer asserts that the "prior denial" at issue in the instant case is Judge Glennon's 1988 original decision and not Judge Kichuk's 1996 decision, and since Judge Glennon found the existence of pneumoconiosis established claimant has established no mistake in a determination of fact.

Employer's contention lacks merit. The administrative law judge correctly indicated that Judge Kichuk's September 18, 1996 decision is the prior denial from which the miner requested modification on March 3, 1997 and which request was before the administrative law judge for adjudication. *See generally Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); Decision and Order at 16 n.7.

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[4]The administrative law judge's consideration of the newly submitted evidence relevant to the existence of pneumoconiosis under 20 C.F.R. §718.202(a) is consistent with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000)(all types of relevant evidence must be considered together in determining whether the existence of pneumoconiosis is established at 20 C.F.R. §718.202(a).) We also note that employer does not contest the administrative law judge's finding that employer did not establish rebuttal at 20 C.F.R. §718.305 based on a showing that the miner did not have pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With regard to the disability causation issue, employer argues that because the miner would have been totally disabled to the same degree and at the same time that he became disabled had he never been a miner, he cannot meet his burden on disability causation and thus cannot establish entitlement. The essence of employer's argument is that the presence of the miner's pre-existing non-respiratory disability due to his 1981 cerebral aneurysm precludes his entitlement to benefits based on any subsequent disability he suffered due to pneumoconiosis. In support of its argument, employer relies, *inter alia,* on the decisions in *Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Claimant and the Director contend that a miner who has a totally disabling respiratory impairment due to pneumoconiosis is entitled to benefits under the Act even if he is also disabled by a preexisting non-respiratory or non-pulmonary condition.[5]

[5]The Director attaches a copy of its brief in *Peabody Coal Co. v. Director, OWCP* [*Morgan*], No. 99-1573 (4th Cir.), which is pending disposition by the court. In its brief in *Morgan*, the Director asserts that the Act's disability causation standards, *see* 30 U.S.C. §902 (f)(1)(A), are ambiguous and the Fourth Circuit has so held in *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). The Director thus argues that his interpretation of the statute must be given deference unless it is unreasonable, and that the Director's interpretation, specifically, that pre-existing disabilities unrelated to coal mine employment are irrelevant to the inquiry of whether the miner's pneumoconiosis renders him totally disabled, is not unreasonable. Attachment to Director's Brief at 42-46. The Director thus urges the court not to adopt the standard enunciated by the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).

The administrative law judge found total respiratory disability at Section 718.204(c)(1) based on the pulmonary function studies dated October 16, 1996 and January 14, 1998, and at Section 718.204(c)(4) based on the 1999 consulting opinion of Dr. Castle, who most recently examined the miner (January, 1998). Director's Exhibit 121. Dr. Castle ultimately found pathologic evidence of simple coal workers' pneumoconiosis, and opined that the miner had no impairment due to coal workers' pneumoconiosis but "probably" was permanently and totally disabled due to smoking-induced emphysema. Employer's Exhibit 14. Based on his findings of total respiratory disability and that the miner established at least 24 years of coal mine employment, the administrative law judge found invocation of the presumption at Section 718.305, noting that it was "presumed that pneumoconiosis is a contributing cause of his impairment. *See Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995)." Decision and Order at 22.

Employer does not contest the administrative law judge's finding that the miner was totally disabled due to a respiratory impairment at Section 718.204(c). Rather, employer argues that the record establishes that the miner became totally disabled due to the brain aneurysm he suffered in 1981, and the administrative law judge failed to consider the import of this evidence in finding that the miner was totally disabled due to pneumoconiosis and therefore entitled to benefits.

The administrative law judge noted, citing to the hearing transcript, "The miner has not had any employment since March [sic] 1981, when he had a cerebral aneurysm. (DX 35)," Decision and Order at 4.[6] In determining the total disability issue at Section 718.204(c) and the disability causation issue at Section 718.204(b), the administrative law judge noted the holding in *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994), that nonrespiratory and nonpulmonary impairments have no bearing on claimant's burden to establish the miner's total disability due to pneumoconiosis at Section 718.204(b). Decision and Order at 21, *Id.* at n.4. He properly based his finding of total respiratory disability at Section 718.204(c)(4) on Dr. Castle's 1999 consulting opinion that the miner had no impairment due to his diagnosed coal workers' pneumoconiosis but "probably" was permanently and totally disabled due to smoking-induced emphysema. *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996)(only issue at 20 C.F.R. §718.204(c) is respiratory impairment, not its etiology); *see also Barber v.*

[6]The miner actually testified that he suffered his aneurysm in May 1981 but was on strike from mining as of March 1981. Director's Exhibit 35 at 11, 12, 15, 21-23.

Director, OWCP, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); Employer's Exhibit 14; Decision and Order at 21.

Further, the decision in *Street*, and the decisions in *Hicks* and *Ballard,* upon which employer relies, address a claimant's affirmative burden of proof at Section 718.204, whereas the instant case involves a miner who is presumed to have been totally disabled due to pneumoconiosis. Specifically, the administrative law judge's finding of entitlement herein was based on his determination that claimant established invocation of the presumption at Section 718.305 and employer failed to meet its burden to rebut the *presumption* that the miner was totally disabled due to pneumoconiosis under Section 718.305. Inasmuch as the regulation specifies that it is employer's burden to show that the miner's *respiratory or pulmonary* impairment did not arise out of, or in connection with, employment in a coal mine, 20 C.F.R. §718.305 (emphasis provided), the administrative law judge did not err when he determined the issue with reference to respiratory or pulmonary impairments only. Employer's arguments to the contrary are rejected. Further, while employer correctly asserts that the record contains medical evidence generated in 1986 and 1988 referring to the miner's deficiencies due to his cerebral aneurysm, *see* e.g. Director's Exhibits 30, 31, 33, the administrative law judge permissibly found that the post-autopsy reports of Drs. Segen, Castle, Naeye and Kleinerman were the most relevant to the issue of disability causation as pneumoconiosis was conclusively established on autopsy.[7] Decision and Order at 22.

Employer argues that Dr. Naeye's opinion on total disability causation is ambiguous and, as a result, worthless, and does not preclude a finding of rebuttal at Section 718.305. Employer also argues that the administrative law judge failed to provide a reason for preferring Dr. Naeye's opinion over the contrary opinions of Drs. Dahhan, Castle and Kleinerman which, employer argues, are reasoned medical opinions establishing that the miner's simple pneumoconiosis resulted in no disability. Finally, employer argues that the administrative law judge failed to consider Dr. Dahhan's February 24, 1999 opinion contained at Employer's Exhibit

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[7]The administrative law judge's crediting of this post-autopsy evidence is consistent with the Fourth Circuit's decision in *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996). Therein, the court indicated that a miner's entitlement is measured by his physical condition at the time of the hearing or, if the miner dies before the hearing, the issue becomes whether he was disabled no later than the month preceding his death. Claimant, in the instant case, waived her right to a hearing and the Decision and Order issued in July 1999, the miner having passed away in July 1998.

15. Claimant responds, and contends that employer's arguments amount to a request that the Board reweigh the evidence.

Employer correctly contends that the administrative law judge failed to weigh Dr. Dahhan's 1999 report contained at Employer's Exhibit 15. Dr. Dahhan found that the miner had simple coal workers' pneumoconiosis based on the pathological findings. He also opined that the miner was disabled prior to his death due to his lung cancer "with no evidence that his simple coal workers' pneumoconiosis caused this disability." Employer's Exhibit 15. Although the administrative law judge duly admitted Dr. Dahhan's 1999 report into the record and considered the physician's 1999 x-ray readings attached thereto, Decision and Order at 3, 5-8, he did not address it on rebuttal at Section 718.305. The administrative law judge's failure to consider relevant evidence constitutes reversible error. Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We thus vacate the administrative law judge's finding on rebuttal at Section 718.305 and remand the case for further consideration.[8]

Employer argues that the administrative law judge's finding on onset is conclusory and does not meet the requirements of the APA. While contesting the miner's entitlement to benefits, employer specifically asserts that there is a "pattern of evidence" suggesting onset of the miner's disability at the time of the filing of the instant second request for modification, or March 1997, and the administrative law judge should have considered the possibility of an onset date from the month of this filing. Employer adds, "Indeed, given the fact that multiple modifications are not available, the 1997 request should be analyzed and considered as a duplicate claim. If that analysis had been used, the onset date would have reverted back to the time of filing of that claim – March 1997 (if the evidence established no other date.)" Employer's Brief at 32.[9]

The administrative law judge initially indicated that benefits are payable beginning with the month of the onset of total disability due to pneumoconiosis. 20

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[8] In light of our decision to vacate the administrative law judge's finding on rebuttal at 20 C.F.R. §718.305, we decline to address employer's additional arguments regarding the administrative law judge's weighing of the evidence.

[9] To the extent that employer's challenge to the administrative law judge's finding is based on its erroneous position that multiple requests for modification are not available under the Act, its argument is rejected. *See* discussion, *supra* at n.3, *Stanley, supra*.

C.F.R. §725.503(b). He found, "This modification request is granted based on a mistake of fact; the date of the originally filed claim controls the regulations which are applicable to the modification petition claim and it also serves as the earliest date from which benefits may be paid. [citations omitted]" Decision and Order at 23. The administrative law judge then determined, "Because no specific onset date of disability is evident from the record, benefits will commence on September 1, 1981, the first day of the month in which the miner filed his claim. [20 C.F.R.] §725.503(b)." Decision and Order at 24.

As discussed above, the administrative law judge relied on pulmonary function studies and medical opinions dating from 1996 and 1998 to find that the miner was totally disabled under Section 718.204(c). Further, after finding that the miner established the existence of pneumoconiosis and thus established a mistake in a determination of fact in the prior denial, the administrative law judge added the following footnote: "I also find that the claimant has established a 'material change in conditions' in that he was totally disabled by the disease at the time of death, for the reasons set forth later in this opinion." Decision and Order at 19 n.10. This latter finding conflicts with the administrative law judge's determination that the miner was totally disabled due to pneumoconiosis at the time of the original filing date, or 1981. We thus vacate the administrative law judge's finding on the onset issue and further remand the case. If the miner is found to be entitled to benefits on remand, then he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis.[10] *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should the administrative law judge find the miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled due to pneumoconiosis, then the miner is entitled to benefits as of his filing date, unless there is evidence, which if credited by the administrative law judge,establishes that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date. *Lykins, supra*.

Accordingly, the administrative law judge's Decision and Order is affirmed in

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[10]Employer does not challenge the administrative law judge's finding of entitlement in the widow's claim by virtue of his award of benefits in the instant deceased miner's claim. *See Skrack, supra*. If, on remand, the administrative law judge awards benefits in the instant claim, the widow would be entitled to benefits. 20 C.F.R. §718.1.

part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge