

BRB No. 01-0960 BLA

MARY HAZEL SPROLES)
(Widow of JAMES SPROLES))
)
 Claimant-Respondent)
)
 v.)
)
 BULLION HOLLOW COAL COMPANY) DATE ISSUED:
)
 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 Awarding Survivor's Benefits On Remand and the Decision and Order Awarding Survivor's Benefits On Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Farmer, Williams & Rutherford), Norton, Virginia, for claimant.

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

Sarah M. Hurley (Eugene Scalia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals both the Decision And Order Awarding Survivor's Benefits On Remand and the Decision and Order Awarding Survivor's Benefits On Reconsideration (95-BLA-2167) of Administrative Law Judge Thomas M. Burke on a survivor's 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 survivor's claim is before the Board for a second time.

Claimant initially filed her claim for survivor's benefits on December 5, 1994. On September 10, 1999, the administrative law judge issued a Decision and Order awarding benefits. The administrative law judge found, based upon the medical opinion evidence of record, that claimant established the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that pneumoconiosis was a substantial contributing cause of the miner's death. Accordingly, benefits were awarded.²

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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant, Mary Hazel Sproles, is the widow of the miner, James Sproles, who died on November 11, 1994. The death certificate lists the miner's cause of death as acute respiratory failure due to chronic obstructive lung disease. Atherosclerotic heart disease and cor pulmonale are listed as other significant conditions present at the time of death. Director's Exhibit 6. The miner was awarded benefits on a claim filed on July 24, 1989, by Administrative Law Judge Daniel J. Roketenetz. This award was affirmed by both the Board, *Sproles v. Bullion Hollow Coal Co.*, BRB No. 95-1053 BLA (May 24, 1996)(unpub.),

Subsequent to an appeal by employer, the Board vacated the award of benefits. *Sproles v. Bullion Hollow Coal Co.*, BRB No. 00-0128 BLA (Nov. 30, 2000)(unpub.). The Board held that the administrative law judge erred in his analysis of the medical opinion evidence of pneumoconiosis as the administrative law judge failed to address all of the factors bearing on the merits of the opinions. *Sproles*, slip op. at 3. Further, the Board held that if, on remand, the administrative law judge were to again determine that the medical opinion evidence supported a finding of pneumoconiosis, the administrative law judge was to then weigh the medical opinion evidence with the other relevant evidence to determine whether the existence of pneumoconiosis was established pursuant to the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), since this case arises in the Fourth Circuit. Lastly, the Board held that if, on remand, the administrative law judge determined that all of the relevant evidence established the existence of pneumoconiosis, the administrative law judge was to determine whether pneumoconiosis was a substantially contributing cause of death.

On remand, the administrative law judge concluded that based on the award of benefits, in the miner's claim, and the finding that the existence of pneumoconiosis was established by medical opinion evidence, in the miner's claim, employer was collaterally estopped from contesting the existence of pneumoconiosis in the survivor's claim. Decision and Order on Remand at 1-4. Pursuant to the Board's remand instructions, however, the administrative law judge nonetheless considered the medical opinion evidence and concluded that such evidence independently supported a finding of the existence of pneumoconiosis in the survivor's claim. Decision and Order on Remand at 5-16. The administrative law judge then weighed all the relevant evidence regarding the existence of pneumoconiosis together pursuant to *Compton, supra, i.e.*, x-ray and medical opinion evidence in this case, and

and the United States Court of Appeals for the Fourth Circuit, *Bullion Hollow Coal Co. v. Sproles*, BRB No. 96-2433 BLA (4th Cir., June 6, 1997). Because the award of benefits on the miner's claim was for a claim filed subsequent to January 1, 1982, claimant was not eligible for derivative benefits based on the miner's award. See 30 U.S.C. §901(a); 20 C.F.R. §725.212; *Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-18-22 (1989); cf. *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

determined that the weight of this evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at on Remand at 4-5, 16. Finally, the administrative law judge determined that the weight of the evidence of record supported a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on the survivor's claim.

Subsequent to a motion for reconsideration by employer, the administrative law judge issued a Decision and Order Awarding Survivor's Benefits on Reconsideration (Decision and Order on Reconsideration). In the Decision and Order on Reconsideration, the administrative law judge rejected employer's assertions regarding the applicability of the new regulations and concluded that the new regulations were applicable to the instant claim. Decision and Order on Reconsideration at 1. The administrative law judge further rejected employer's assertion that he had erred in applying *sua sponte* the doctrine of collateral estoppel in this case. Decision and Order on Reconsideration at 2. Lastly, the administrative law judge rejected employer's assertions on the merits and reiterated his findings on the merits. Decision and Order on Reconsideration at 2. Accordingly, employer's motion for reconsideration was denied and survivor's benefits were again awarded.

On appeal, employer contends that the administrative law judge had no authority to apply *sua sponte* the doctrine of collateral estoppel in this case. Rather, employer asserts that claimant's failure to raise the issue in earlier proceedings constituted a waiver of his right to assert that affirmative defense. Employer further argues that the administrative law judge erred in concluding that the weight of the evidence, as a whole, supported a finding of the existence of pneumoconiosis. Lastly, employer contends that administrative law judge erred in finding that pneumoconiosis caused the miner's death. Claimant, in response, urges that the award of benefits be affirmed. The Director Office of Workers' Compensation Programs (the Director), responds for the limited purpose of challenging employer's assertions regarding the administrative law judge's application of collateral estoppel, and also contends that the administrative law judge properly applied the new regulations. In reply, employer reiterates its contentions.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v.*

Director, OWCP, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

At the outset, we note that because the administrative law judge addressed all of the evidence relevant to the existence of pneumoconiosis and independently found, based upon his consideration of that evidence, that the existence of pneumoconiosis was established, his finding that the doctrine of collateral estoppel applied in this case was rendered moot. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We do note, however, that collateral estoppel could not, in this case, act to preclude employer from relitigating the issue of the existence of pneumoconiosis inasmuch as the standard for determining the existence of pneumoconiosis was changed by the Fourth Circuit subsequent to the award of benefits in the miner's claim. See *Compton, supra*; see also *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

Regarding the administrative law judge's determination that the medical opinions of record support a finding of pneumoconiosis, employer asserts that the administrative law judge failed to explain why he found that the opinions of Drs. Robinette, Paranthaman, Barongan and Nash, diagnosing the existence of pneumoconiosis, Director's Exhibits 8, 9, 11, 13, 14, 37, 38, constituted well-reasoned medical opinions, while the contrary medical opinions of Drs. Sargent, Renn and Castle, Employer's Exhibits 6, 7, 10, 11, 14-16, did not. Employer's Brief at 17-18. Employer further contends that the administrative law judge: erred in finding that Drs. Sargent, Renn and Castle ruled out the possibility of a dust-induced impairment; erred in rejecting the opinions of Drs. Renn and Castle because they concluded that the miner's respiratory impairment was not reversible when there was no basis for such a determination; and erred in discrediting the opinions of Drs. Renn and Castle because they were impermissibly based on the premise that pneumoconiosis was not progressive. In addition, employer argues that the physicians did not reach the conclusions the administrative law judge attributed to them. Employer's Brief at 22. Finally, employer asserts that the administrative law judge failed to address fully the relative qualifications of the physicians in a manner consistent with the holdings of the Fourth Circuit in *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), when he accorded greater weight to the opinion of Dr. Robinette based on his status as claimant's treating physician.

When this case was previously before the Board, the Board vacated the administrative law judge's determination that the medical opinion evidence supported a finding of the existence of pneumoconiosis, holding that the administrative law judge's decision to accord determinative weight to the opinions of Drs. Barongan and Robinette, without addressing all of the factors bearing on the relative merits of the opinions, contravened both the Administrative Procedure Act (the 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), which requires that all decisions state their bases and the decisions of the Fourth Circuit in *Hicks, supra*, and *Akers, supra*. The Board instructed the administrative law judge to assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgements, and the sophistication and bases of their diagnoses." *Sproles*, slip op. at 3; see *Akers, supra*; see also *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

On remand, the administrative law judge concluded that Dr. Robinette's opinion of pneumoconiosis was based on chest x-ray interpretations, objective studies and physical examinations, and that the opinion was entitled to the most weight because it was based on the most extensive medical data, multiple examinations and a thorough review of the miner's other medical records, and because Dr. Robinette was board-certified in internal medicine with a subspeciality in pulmonary disease. Additionally, the administrative law judge found that Dr. Robinette's opinion was buttressed by the medical treatment notes of Dr. Barongan, who was the miner's treating physician during times of hospitalization, and the opinions of Drs. Nash and Paranthaman. Finally, the administrative law judge further found that the contrary opinions of Drs. Renn, Castle and Sargent were "unpersuasive," as they were not as well-reasoned as the opinion of Dr. Robinette, or the opinions which supported Dr. Robinette's opinions. Decision and Order at 14.

Contrary to employer's assertions, the administrative law judge permissibly accorded the greatest weight to Dr. Robinette's opinion because Dr. Robinette's opinion was best supported by the underlying documentation and, therefore, provided a "more complete assessment of the miner's condition." Decision and Order on Remand at 16; see *Hicks, supra*; *Akers, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, while recognizing that Dr. Robinette was not as highly-qualified as those physicians rendering contrary opinions, the administrative law judge nonetheless found that his opinion was entitled to greater weight, based on the length of time he treated the miner, as well as the fact that he provided the most complete analysis of the miner's conditions. This was rational. See *Hicks, supra*; *Akers, supra*. Contrary to employer's assertion, the administrative law judge did not accord the greatest weight to the opinion of Dr. Robinette merely because he was the miner's treating physician, but because he provided

a well-documented, well-reasoned medical opinion. This was proper. Decision and Order on 15-16; *see Clark, supra; Peskie, supra; Lucostic, supra.*

We conclude, therefore, that the administrative law judge has complied with the Board's remand instructions and has provided sufficient basis for according Dr. Robinette's opinion dispositive weight in this case. *See Hicks, supra; Akers, supra.* We reject employer's assertions that the opinions of Drs. Sargent, Renn and Castle are more credible, as these assertions are, in the context of the administrative law judge's affirmable consideration of Dr. Robinette's opinion, tantamount to a request that the Board reweigh the evidence, a function outside its scope of review, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we affirm the administrative law judge's determination that the medical opinion evidence is supportive of a finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer contends, however, that the administrative law judge failed to weigh adequately the negative x-ray evidence together with the medical opinion evidence pursuant to *Compton, supra.* On remand, the administrative law judge found that in light of the discrepancies in interpreting the chest x-rays, the negative x-ray evidence did not preclude a finding of legal pneumoconiosis in this case. Decision and Order on Remand at 5. Thus, the administrative law judge concluded that "the preponderance of the probative medical opinion evidence supports a finding that the miner suffers from coal workers' pneumoconiosis under 20 C.F.R. §718.202(a)(4) and this finding is not altered by the preponderantly negative chest x-ray evidence...." Decision and Order on Remand at 16. This was rational. *See Compton, supra.*

Employer next asserts that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis. Specifically, employer contends that the administrative law judge erred in according greatest weight to the opinion of Dr. Robinette that pneumoconiosis hastened the miner's death because it compromised his respiratory system, Director's Exhibit 37, as Dr. Robinette failed to address the effect of the miner's lengthy smoking history on the miner's death.

In finding that claimant established that the miner's death was due to pneumoconiosis, the administrative law judge found that Dr. Robinette's opinion, that the miner's death was hastened by pneumoconiosis, was best supported by the underlying documentation of record. Decision and Order at 17; *see Clark, supra; Peskie, supra; Lucostic, supra.* Further, contrary to employer's assertion, inasmuch as claimant's burden at Section 718.205(c) is to provide medical evidence sufficient to demonstrate that pneumoconiosis hastened the miner's death, *see Shuff, supra*, the failure of Dr. Robinette to address specifically the role that smoking may have played in the miner's death does not undermine the credibility of his determination that pneumoconiosis hastened the miner's death. The administrative law judge

found that the opinions of Drs. Renn and Castle, that the miner's death was not related to pneumoconiosis, Employer's Exhibits 15, 16, were not entitled to much weight because they failed to diagnose the existence of pneumoconiosis and therefore failed to present a complete picture of the miner's health. This was rational. Decision and Order on Remand at 17; *see Stark v. Director, OWCP*, 9 BLR 1-36 (1989). The administrative law judge, therefore, properly found that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(5); *Shuff, supra*.

Accordingly, the administrative law judge's Decision And Order Awarding Survivor's Benefits On Remand and the Decision And Order Awarding Survivor's Benefits On Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge