BRB No. 05-0904 BLA

FRANCES E. POOLE (Widow of STERLING POOLE) Claimant-Petitioner v. FREEMAN UNITED COAL MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/30/2006 DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

R. Henry Sarpy, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for claimant.

Shannon L. Clark (Gould & Ratner), Chicago, Illinois, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (04-BLA-0098) of Administrative Law Judge Lee J. Romero, Jr. denying 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, involving both a miner's claim filed on January 20,

[1]Claimant is the surviving spouse of the deceased miner who died on November 15, 2000. Director's Exhibit 5.

1990 and a survivor's claim filed on December 14, 2000, is before the Board for the second time.

In the initial decision, the administrative law judge found that while the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(3) and (a)(4), the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Director's Exhibit 58. However, in weighing all of the relevant evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* Although the administrative law judge noted that employer did not contest the fact that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, the administrative law judge denied benefits on the miner's claim. *Id.* The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* Consequently, the administrative law judge also denied benefits on the survivor's claim. *Id.*

Claimant, representing herself, filed an appeal with the Board. Director's Exhibit 59. In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand, conceding that he failed to provide the miner with a complete, credible pulmonary evaluation because Dr. Hebert, the physician who performed the Department of Labor sponsored physical evaluation, failed to address: (1) whether the miner suffered from "legal" pneumoconiosis; and (2) whether the miner's total disability was due to pneumoconiosis. *See* Director's Exhibit 62. By Decision and Order dated September 17, 2003, the Board granted the Director's request to vacate the administrative law judge's denial of benefits on the miner's claim and remanded the case to the district director for further development of the medical evidence. *Poole v. Freeman United Coal Mining Co.*, BRB No. 03-0117 BLA (Sept. 17, 2003) (unpublished). The Board also remanded the survivor's claim for further development of the medical evidence. *Id.*

In compliance with the Board's directive, the district director requested that Dr. Rose review the medical evidence and address: (1) whether the miner suffered from pneumoconiosis at the time of his death; (2) whether the miner's total disability was due to pneumoconiosis; and (3) whether the miner's death was due to pneumoconiosis. Director's Exhibit 66. Based upon a review of the medical evidence, Dr. Rose submitted a report dated March 9, 2004. *See* Director's Exhibit 67. In a Proposed Decision and Order dated March 16, 2004, the district director found that Dr. Rose's opinion supported the miner's claim that he was totally disabled by pneumoconiosis at the time of his death

and supported the survivor's claim that the miner's death was due to pneumoconiosis. Director's Exhibit 68. The miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges on March 15, 2004 for a formal hearing. Director's Exhibit 69. The administrative law judge held a hearing on February 10, 2005.

In a Decision and Order dated July 28, 2005, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[2] Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits on the miner's claim. The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, also denied benefits on the survivor's claim. On appeal, claimant contends that the administrative law judge erred in finding the autopsy report insufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Claimant further argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates her previous contentions of error. The Director has not filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

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[2]In considering all of the evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge, moreover, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

[3]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially argues that the administrative law judge "erred in failing to find legal pneumoconiosis in the autopsy report because there were 'no macules' found during the autopsy." Claimant's Brief at 10. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Dr. Gabrawy performed the miner's autopsy on November 21, 2000. In an autopsy report dated March 26, 2001, Dr. Gabrawy diagnosed (1) coronary atherosclerosis; (2) pulmonary congestion; (3) bronchopneumonia; and (4) anthracosilicosis. Director's Exhibit 36. Although a diagnosis of anthracosilicosis constitutes a diagnosis of "clinical pneumoconiosis," *see* 20 C.F.R. §718.201(a)(1), the administrative law judge noted that Dr. Gabrawy, during an August 19, 2004 deposition, explained that he used the term "anthracosilicosis" to describe black pigmentation and that he did not consider it to be a diagnosis equivalent to coal workers' pneumoconiosis. Decision and Order at 18; Employer's Exhibit 52 at 18-19. The administrative law judge, therefore, found that Dr. Gabrawy's autopsy report did not support a finding of clinical pneumoconiosis. Decision and Order at 28; *see* 20 C.F.R. §718.201(a)(1). Because this finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, because Dr. Gabrawy did not relate any of his other diagnoses to claimant's coal dust exposure,[4] Dr. Gabrawy's autopsy report does not support a finding of "legal" pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although claimant does not challenge the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of "clinical" pneumoconiosis,[6]

[4]Dr. Gabrawy testified that the miner did not suffer from any disease caused by his coal dust exposure. Employer's Exhibit 52 at 18.

[5]As previously noted, "legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[6]Because no party challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of "clinical" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed. *Skrack*, *supra*.

she argues that the administrative law judge erred in not addressing whether the medical opinion evidence was sufficient to establish the existence of "legal" pneumoconiosis. We agree. Although the administrative law judge indicated that he was aware of the distinction between "clinical" pneumoconiosis and "legal" pneumoconiosis, *see* Decision and Order at 24, he nevertheless focused exclusively on whether the medical opinion evidence was sufficient to establish the existence of "clinical" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In his discussion of the medical opinion evidence, the administrative law judge addressed only diagnoses of "pneumoconiosis," "coal workers' pneumoconiosis," "black lung" and "anthracosilicosis." *See* Decision and Order at 29-33. The administrative law judge failed to address whether the evidence was sufficient to establish that the miner's emphysema/chronic obstructive pulmonary disease was due in part to his coal dust exposure, thereby supporting a finding of "legal" pneumoconiosis.[7] Consequently, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge for his consideration of whether the medical opinion evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R §718.202(a)(4).[8]

Because the administrative law judge must evaluate whether the medical opinion evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an analysis that could affect his weighing of the evidence on the

[7]Claimant specifically argues that the administrative law judge erred in finding the opinions of Drs. Rose, Hebert and Winkler insufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). While Dr. Gabrawy, the autopsy prosector, did not diagnose emphysema and/or chronic obstructive pulmonary disease, Director's Exhibit 36; Employer's Exhibit 52, Drs. Rose, Winkler, Hebert, Zacharia, Fino, Kress and Emory each opined that the miner suffered from emphysema and/or chronic obstructive pulmonary disease. Director's Exhibit 44; Claimant's Exhibits 1, 4, 13, 15, 16, 18; Employer's Exhibits 4, 5, 46-49, 55- 57. These physicians, however, disagreed as to whether the miner's lung disease was attributable in part to his coal dust exposure. On remand, the administrative law judge must reconcile the conflicting evidence and render a finding as to whether the medical opinion evidence is sufficient to establish "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[8]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the miner's most recent coal mine employment occurred in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2. Because this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, the holding in *Compton*, that an administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), is not applicable in this case.

issue of disability causation, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c).

Similarly, since the administrative law judge must evaluate whether the medical opinion evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R §718.202(a)(4), an analysis that could affect his weighing of the evidence on the issue of the cause of the miner's death, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c). *See Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

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 consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge