BRB No. 01-0305 BLA

ALMA MARSHALL (Widow of GEORGE MARSHALL) Claimant-Respondent v. PINEY CREEK COAL COMPANY Employer-Petitioner and KESSLER COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

John P. Scherer (File, Payne, Scherer & File), Beckley, West Virginia, for employer.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (97-BLA-1392) of

Administrative Law Judge Daniel F. Sutton awarding 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).[1] In the initial Decision and Order, the administrative law

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

judge, after crediting the miner with thirty-three years and eight months of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000).[2] The administrative law judge, however, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.204(a)(4) (2000). The administrative law judge also found that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). The administrative law judge further found that the evidence was sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000) and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated June 27, 2000, the Board, *inter alia*, affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) (2000) and 718.204(c) (2000) as unchallenged on appeal. *Marshall v. Piney Creek Coal Co.*, BRB No. 99-0968 BLA (June 27, 2000) (unpublished). The Board also affirmed the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* The Board, however, noted that, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Id.*; s*ee Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). The Board, therefore, remanded the case to the administrative law judge for his weighing of all the evidence together under Section 718.202(a) in accordance with *Compton*. *Id.* The Board also vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) (2000) and remanded the case for further consideration.

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[2]The administrative law judge found that the x-ray evidence was "inconclusive." Decision and Order at 12-13. The administrative law judge, therefore, found that claimant failed to establish the presence of pneumoconiosis by a preponderance of the x-ray evidence. *Id.*

On remand, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The administrative law judge further found that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis. Employer also argues that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis. Neither claimant[3] nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

[3]Claimant is the surviving spouse of the deceased miner who died on July 2, 1991. Director's Exhibit 24. Claimant is pursuing the miner's claim. The Board previously affirmed the administrative law judge's decision to remand claimant's survivor's claim to the district director for further evidentiary development. *Marshall v. Piney Creek Coal Co.*, BRB No. 99-0968 BLA (June 27, 2000) (unpublished).

Employer argues that the administrative law judge erred in finding that the evidence was sufficient to establish the existence of pneumoconiosis. The Board previously affirmed the administrative law judge's finding that Dr. Rasmussen's opinion that the miner suffered from pneumoconiosis[4] was entitled to greater weight than Dr. Hansbarger's contrary opinion.[5] *Marshall*, *supra*. However, the Board remanded the case to the administrative law judge for his weighing of all the evidence together under Section 718.202(a) in accordance with *Compton*. *Id.*

On remand, the administrative law judge stated:

> ....I find that the inconclusive x-ray evidence in this record does not directly contradict or offset the medical opinion evidence which I have found sufficient to establish the existence of pneumoconiosis. In making this finding, I note with particular emphasis that Dr. Rasmussen, whose opinion I credited over the contrary views expressed by Dr. Hansbarger, diagnosed both medical and legal pneumoconiosis. That is, his cardiopulmonary diagnosis included both coal workers' pneumoconiosis which he based on 40 years of coal mine

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[4]Dr. Rasmussen examined the miner on January 25, 1991. In a report dated January 25, 1991, Dr. Rasmussen diagnosed, *inter alia*, coal workers' pneumoconiosis and chronic bronchitis. Director's Exhibit 9. Dr. Rasmussen attributed the miner's coal workers' pneumoconiosis to coal mine dust exposure and the miner's chronic bronchitis to his coal mine dust exposure and cigarette smoking. *Id.*

[5]Dr. Hansbarger reviewed the medical evidence. In a report dated January 8, 1992, Dr. Hansbarger opined that the miner did not suffer from coal workers' pneumoconiosis. Director's Exhibit 29. Dr. Hansbarger opined that the miner suffered from chronic obstructive pulmonary disease due to his cigarette smoking. *Id.* Dr. Hansbarger reiterated his opinions during a March 4, 1992 deposition. Director's Exhibit 32.

> employment and a positive chest x-ray and chronic bronchitis which he attributed to the combined effects of coal mine dust exposure and cigarette smoking. Director's Exhibit 9 at 4. Thus, while the inconclusive nature of the x-ray evidence can reasonably call Dr. Rasmussen's diagnosis of medical pneumoconiosis into question, it does not negate his additional diagnosis of legal pneumoconiosis. Accordingly, I conclude upon consideration of all the relevant evidence under [S]ection 718.202(a)(1)-(4) that the Claimant has established by a preponderance of the evidence that the Miner suffered from pneumoconiosis as defined in the Act.

Decision and Order on Remand at 6.

Employer argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion that the miner suffered from pneumoconiosis over Dr. Hansbarger's contrary opinion. Employer's Brief at 14-15. We disagree. The Board's previous holding that the administrative law judge properly found that Dr. Rasmussen's opinion that the miner suffered from pneumoconiosis was entitled to greater weight than Dr. Hansbarger's contrary opinion constitutes the law of the case and governs our determination herein.[6] *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984);

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[6]In affirming the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the Board held that the administrative law judge properly credited Dr. Rasmussen's opinion that the miner suffered from pneumoconiosis as better reasoned and documented than Dr. Hansbarger's opinion. *Marshall*, *supra*. The Board specifically rejected employer's contention that Dr. Rasmussen ignored the miner's extensive smoking history and evidence of arteriosclerotic heart disease. *Id.* The Board further stated that:

> The administrative law judge properly stated that Dr. Rasmussen made his diagnosis of pneumoconiosis after considering the miner's histories, clinical findings on examination, and results of objective testing, which included an x-ray, pulmonary function study and arterial blood gas study. Decision and Order at 16; Director's Exhibits 8, 9. The administrative law judge further correctly stated that Dr. Hansbarger, who did not examine the miner but reviewed much of the evidence of record, evidently did not review the positive x-ray interpretations of Drs. Speiden and Francke, since he indicated that all of the x-ray interpretations were negative for pneumoconiosis, and did not address the fact that the miner's treating physician, Dr. Subbaraya, consistently diagnosed pneumoconiosis in his numerous hospitalization reports during an approximate ten year period. Decision and Order at 16; Director's Exhibit 29.

Marshall, *supra*. We, therefore, affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a).

Employer also contends that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis. When the instant case was previously before the Board, the Board held that the administrative law judge improperly rejected Dr. Hansbarger's opinion that the miner's total disability was not due to pneumoconiosis. The Board held that:

> The administrative law judge rejected Dr. Hansbarger's opinion on disability causation solely because Dr. Hansbarger concluded that the miner did not have pneumoconiosis, a conclusion at odds with the administrative law judge's finding that the miner had the disease. Decision and Order at 18. This reasoning violates the holding of the United States Court of Appeals for the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). In *Ballard*, the court held that, even though an administrative law judge has found that a miner suffers from pneumoconiosis, a physician's disability causation opinion which is premised upon an understanding that the miner does not have pneumoconiosis may still have probative value when the opinion

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Marshall, slip op. at 5.

The Board held that the administrative law judge's determination that Dr. Rasmussen's opinion was well reasoned and documented and entitled to greater weight than Dr. Hansbarger's report was supported by substantial evidence and was in accordance with law. *Marshall*, *supra*. The Board, therefore, affirmed the administrative law judge's finding that the medical opinion evidence was sufficient to establish that the miner suffered from pneumoconiosis. *Id.*

> acknowledges the miner's pulmonary or respiratory impairment, as does Dr. Hansbarger's opinion in the instant case. *See Ballard*, *supra*; Director's Exhibits 29, 32. The court explained that such an opinion is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Id.*

Marshall, *supra*, slip op. at 6.

The Board, therefore, vacated the administrative law judge's finding under Section 718.204(b) (2000)[7] and remanded the case for reconsideration.

On remand, the administrative law judge noted that the facts of the instant case were significantly different from those in *Ballard*. In *Ballard*, the United States Court of Appeals for the Fourth Circuit held that the administrative law judge correctly credited the unanimous opinion of four physicians that a miner's disability was due to a pneumonectomy rather than pneumoconiosis. *Ballard*, *supra*. The Fourth Circuit held that the four physicians' diagnoses that the miner did not suffer from coal workers' pneumoconiosis did not contradict the administrative law judge's conclusion that the miner had simple pneumoconiosis within the meaning of 20 C.F.R. §718.201 (2000). *Id*. The Fourth Circuit noted that the four physicians simply stated that they found no evidence of coal workers' pneumoconiosis, one of many ailments that would satisfy the legal definition of pneumoconiosis. *Id*. Because the physicians had not premised their opinions on an "erroneous finding," the Fourth Circuit held that the administrative law judge correctly credited their opinions that the miner's total disability was due to a pneumonectomy rather than pneumoconiosis. *Id.*

In the instant case, the administrative law judge, on remand, stated that:

> From a careful reading of [Dr. Hansbarger's] report and deposition testimony, it is clear that Dr. Hansbarger failed to consider pneumoconiosis as an additional cause of the Miner's totally disabling respiratory impairment. His failure to diagnose either medical or legal pneumoconiosis places his opinion

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[7]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

> in irreconcilable conflict with any finding that the existence of pneumoconiosis has been established and thus constitutes an appropriate basis under [*Ballard*] for according his opinion on total disability causation little value. *See* [*Compton*], 211 F.3d at 213-214. Dr. Rasmussen, on the other hand, diagnosed coal workers' pneumoconiosis, chronic bronchitis and arteriosclerotic heart disease, and he stated that the Miner's past history of cigarette smoking and coal mine dust exposure with resulting pneumoconiosis both could cause his pulmonary abnormalities. After properly considering the Miner's multiple diagnoses and histories, Dr. Rasmussen reasonably concluded that the Miner's coal dust exposure was a major contributing factor to his totally disabling respiratory insufficiency. Director's Exhibit 8 at 3.
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> For these reasons, I credit Dr. Rasmussen's reasoned opinion on disability causation over the conclusory and poorly supported opinion offered by Dr. Hansbarger. Accordingly, I again find that the Claimant has established by a preponderance of the evidence that the Miner's total disability was due to pneumoconiosis.

Decision and Order on Remand at 7-8.

Dr. Hansbarger failed to diagnose either medical or legal pneumoconiosis. Although Dr. Hansbarger found that the miner suffered from a totally disabling pulmonary impairment, he attributed the miner's disability to coronary artery disease and chronic obstructive pulmonary disease. Director's Exhibit 32. Dr. Hansbarger opined that there was no connection between the miner's coronary artery disease and his coal dust exposure. *Id.* Dr. Hansbarger attributed the miner's chronic obstructive pulmonary disease to his cigarette smoking history. *Id.* Dr. Hansbarger also specifically noted that chronic obstructive pulmonary disease was not the same thing as coal workers' pneumoconiosis. *Id.*

Dr. Hansbarger's diagnosis that the miner did not suffer from coal workers' pneumoconiosis, coupled with his opinion that the miner's chronic obstructive pulmonary disease was attributable to his cigarette smoking history, contradicts the administrative law judge's conclusion that the miner had simple pneumoconiosis within the meaning of 20 C.F.R. §718.201. Because Dr. Hansbarger's opinion regarding disability causation was, in fact, based upon an erroneous assumption that the miner did not suffer from pneumoconiosis, medical or legal, we hold that the administrative law judge properly discredited Dr. Hansbarger's opinion regarding the cause of the miner's total disability.

The administrative law judge found that Dr. Rasmussen's opinion was sufficient to establish that the miner's total disability was due to pneumoconiosis. In making this determination, the administrative law judge applied the standard set out in *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), *i.e.*, that pneumoconiosis

was at least a contributing cause of the miner's totally disabling respiratory impairment. *See* Decision and Order on Remand at 6. We note that the disability causation standard has been revised. Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Because the administrative law judge has not addressed whether Dr. Rasmussen's opinion is sufficient to satisfy the new disability causation standard set out at 20 C.F.R. §718.204(c), we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's total disability was due to pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in 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

I concur.

NANCY S. DOLDER
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's total disability was due to pneumoconiosis. Because Dr. Rasmussen opined that the miner's occupational dust exposure was "at least a major contributing factor for his disabling impairment," Director's Exhibit 9, I would hold that Dr. Rasmussen's opinion satisfies the new disability causation standard set out at 20 C.F.R. §718.204(c). I would, therefore, affirm the administrative law judge's finding that the evidence is sufficient to establish that the miner's total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(c).

I concur in all other respects in the majority opinion.

BETTY JEAN HALL, Chief
Administrative Appeals Judge