



BRB No. 17-0197 BLA
and 17-0198 BLA

WILMA RICHARDSON)
(o/b/o and Widow of BILLY J.)
RICHARDSON))

Claimant-Respondent)

v.)

J. SMITH COAL, INCORPORATED)

and)

DATE ISSUED: 12/26/2017

SECURITY INSURANCE COMPANY OF)
HARTFORD, C/O ARROWPOINT)
CAPITAL)

Employer/Carrier-)
Petitioners)

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 of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for
claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson,
Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.
PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2010-BLA-05545, 2016-BLA-05619) of Administrative Law Judge John P. Sellers, III, awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on August 28, 2009, and a survivor's claim filed on February 12, 2015.¹

In the initial decision, the administrative law judge credited the miner with thirteen years and eleven months of coal mine employment.² Because the miner established less than fifteen years of coal mine employment, the administrative law judge found that the miner did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.³ 30 U.S.C. §921(c)(4) (2012). Turning to whether the miner could establish his entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis, however, in the form of chronic obstructive pulmonary disease (COPD) due in part to coal mine dust exposure. 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). But he concluded that the evidence did not establish that the miner's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and he denied benefits.

¹ Employer's appeal in the miner's claim was assigned BRB No. 17-0197 BLA, and its appeal in the survivor's claim was assigned BRB No. 17-0198 BLA. By Order dated March 6, 2017, the Board consolidated these appeals for purposes of decision only.

² The record reflects that the miner's last coal mine employment was in Kentucky. Hearing Transcript at 17. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Pursuant to the miner's appeal,⁴ the Board affirmed the administrative law judge's length of coal mine employment finding, his finding that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and his finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). *Richardson v. J. Smith Coal, Inc.*, BRB No. 15-0051 BLA (Dec. 14, 2015) (unpub.). The Board held that the administrative law judge applied an erroneous standard in his analysis of whether the medical opinion evidence established that the miner's total disability was due to pneumoconiosis, however. The Board therefore vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and remanded the case. *Id.*

On remand, the administrative law judge found that the medical opinion evidence⁵ established that the miner's total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits in the miner's claim. The administrative law judge further determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant Section 422(l), 30 U.S.C. §932(l), and awarded survivor's benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and erred in finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). Employer also challenges the administrative law judge's finding that the medical opinion evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

⁴ While his appeal was pending before the Board, the miner died on January 4, 2015. Director's Exhibit 13. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

⁵ On remand, the administrative law judge granted claimant's motion to develop additional evidence, allowing both parties until September 9, 2016 to submit any additional documentary evidence. In response, claimant submitted Dr. Sood's September 8, 2016 medical report. Employer did not submit any additional evidence. The administrative law judge admitted Dr. Sood's medical report into the record. Decision and Order on Remand at 3. As the administrative law judge accurately noted, claimant's submission of Dr. Sood's medical report did not exceed the evidentiary limitations because claimant had previously submitted only one affirmative case medical report. *Id.* at 2; *see* 20 C.F.R. §725.414(a)(2)(i).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

Employer asserts that "there has been no good diagnosis of pneumoconiosis in this claim," and that "no doctor in this case has actually relied upon a presumptively qualifying medical test to determine that the [miner] [was] totally disabled due to pneumoconiosis." Employer's Brief at 17. The Board previously rejected these identical arguments, however, affirming the administrative law judge's findings regarding the existence of legal pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b). *Richardson*, slip op. at 3 n.4. The Board's holdings on those issues constitute the law of the case, and employer has not shown that an exception to the doctrine applies here. See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). We therefore decline to address employer's arguments.

Employer next argues that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Pneumoconiosis is a substantially contributing cause of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "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)(i),(ii).

When the case was previously before the Board, the Director argued that because the administrative law judge found that the miner's COPD was legal pneumoconiosis and the sole cause of the miner's respiratory impairment, the miner had established that his legal pneumoconiosis was a "substantially contributing cause" of his total disability as a matter of law. The Board agreed with the Director that the miner would be entitled to benefits if the miner's COPD was the only pulmonary disease that could have caused his total disability. *Richardson*, slip op. at 7. The Board noted that the record contained evidence of a left upper lobectomy and a "history of squamous cell carcinoma," however, and remanded the case for the administrative law judge to address these issues. *Id.*

On remand, the administrative law judge relied upon the opinions of Drs. Baker, Chavda, and Houser to find that the miner's COPD was the sole cause of his disabling pulmonary impairment. Decision and Order on Remand at 14.

The administrative law judge next addressed Dr. Sood's newly submitted medical report.⁶ Dr. Sood opined that the miner's COPD, associated with severe spirometric obstruction, moderately reduced diffusing capacity, hyperinflation, and air trapping, was a substantially contributing cause of his pulmonary disability. Claimant's Post-Hearing Exhibit 1. He further noted that the miner underwent a lobectomy on February 5, 2013 during treatment for lung cancer that was complicated postoperatively by left hemidiaphragmatic paralysis. *Id.* He noted that this surgery contributed to an 18% decline in the miner's post-bronchodilator FEV1 value, based upon the results of a March 2013 pulmonary function study. *Id.* Dr. Sood opined that the physiological effects of the surgery only compounded the pre-existing effects of the miner's COPD, however, because the miner was totally disabled prior to the lung resection surgery.⁷ *Id.*

The administrative law judge thus found no evidence that the miner's lung cancer was the original cause of the miner's totally disabling pulmonary impairment. Decision and Order on Remand at 14. Rather, he credited Dr. Sood's opinion that the miner's lung cancer and lobectomy were responsible for an *additional* 18% decline in his pulmonary function. *Id.* The administrative law judge therefore found that the miner's COPD was a substantially contributing cause of the miner's total disability. *Id.* at 16.

Employer generally asserts that the medical evidence is insufficient to establish that the miner's total disability was due to his COPD, but alleges no specific error in regard to the administrative law judge's consideration of the evidence.⁸ *See Cox v.*

⁶ The administrative law judge noted that at the time of the 2013 hearing, there was very little, if any, discussion in the record regarding whether the miner's lung cancer and surgery were alternative causes of, or contributors to, the miner's totally disabling pulmonary impairment. Decision and Order on Remand at 13. The administrative law judge therefore afforded the parties an opportunity on remand to submit evidence relevant to this issue. *Id.*

⁷ Dr. Sood noted that the miner's pulmonary function studies conducted prior to his lung resection surgery (June 14, 2011, October 27, 2011, and January 28, 2013) produced qualifying values. Claimant's Post-Hearing Exhibit 1.

⁸ While employer asserts that the administrative law judge should not have admitted Dr. Sood's medical report into evidence, it provides no basis for its position. Employer's Brief at 18. Employer also contends that Dr. Sood's report "cannot be given weight" because it was not signed by the physician. *Id.* Employer, however, cites no authority for its position that an unsigned medical report cannot be accorded any weight. Employer also fails to cite any evidence that Dr. Sood did not complete the September 8, 2016 medical report, which appears under a letterhead listing each of Dr. Sood's Board-certifications. Claimant's Post-Hearing Exhibit 1. Finally, employer notes that Dr. Sood

Benefits Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding, however, we must limit our review to specific contentions of error raised by the parties. See 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that the evidence established that the miner's total disability was due to COPD (legal pneumoconiosis) pursuant to 20 C.F.R. §718.204(c), and affirm the award of benefits in the miner's claim.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(l): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Decision and Order on Remand at 17. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l). 30 U.S.C. §932(l); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

considered the miner's death certificate, which was not admitted in the miner's case. Employer's Brief at 18. Although Dr. Sood considered the miner's death certificate in assessing the cause of the miner's death, the doctor did not rely upon the death certificate in assessing the cause of the miner's totally disabling pulmonary impairment.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge