BRB No. 01-0449 BLA

DRAPER L. WOODARD (Widow of NOBLE H. WOODARD)	)	
Claimant-Petitioner	)	
v.	)	
DOMINION COAL COMPANY	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Second Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Draper L. Woodard, Honaker, Virginia, *pro se*.

Robert E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] the miner's widow, appeals the Decision and Order On Second

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services in St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Remand (97-BLA-1611) of Administrative Law Judge Clement J. Kichuk denying benefits on the miner's and the survivor's claims 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).[2] Based on the date of filing, the administrative law judge adjudicated the claims pursuant to 20 C.F.R. Part 718. This case is on appeal to the Board for the third time. The prior history of this case is set forth in the Board's most recent decision in *Woodard v. Dominion Coal Co.*, BRB No. 99-1147 BLA (Aug. 9, 2000)(unpub.). In that case, pursuant to an appeal by employer, the Board vacated the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis and was therefore sufficient to establish invocation of the irrebuttable presumption at Section 718.304, 30 U.S.C. §921(c)(3), and remanded the case for reconsideration and reweighing of all the relevant evidence together at Section 718.304(a)-(c), to specifically address the qualifications of the physicians rendering findings contrary to Dr. Byers's x-ray reading, the documentation underlying opinions contrary to Dr. Byers's findings, and to address Dr. Berry's opinion. The Board further instructed the administrative law judge that if he determined, on remand, that the evidence was insufficient to establish the existence of complicated pneumoconiosis, he must then determine in the survivor's claim whether the evidence was sufficient to establish that the miner's

[2] 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. 80,107 (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 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, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). Employer argues in response to the Board's order, that generally employer objects to any retroactive application of the regulation as violative of the Administrative Procedure Act, but argues that the Board does not need to reach these issues as the denial of the benefits can be affirmed. 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 Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

death was due to pneumoconiosis. Additionally, the Board instructed the administrative law judge to reconsider whether modification was established on the miner's claim. *Woodard*, *supra*.

On remand, the administrative law judge concluded that the evidence failed to establish that the miner suffered from complicated pneumoconiosis, and that the prior administrative law judge had therefore made a mistake in the determination of fact pursuant to Section 725.310 (2000) when he found the presence of complicated pneumoconiosis established. Considering the evidence on the merits in the miner's claim, the administrative law judge found that it failed to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(c)(2000). Further, considering the survivor's claim, the administrative law judge found that, even assuming that the existence of pneumoconiosis had been established, the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2000). Accordingly, benefits were denied on both the miner's and the survivor's claims.

On appeal, claimant generally contends that the evidence establishes the existence of pneumoconiosis and death due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits on both the miner's and survivor's claims. The Director, Office of Workers' Compensation Programs, filed a letter indicating that he will not be participating in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202(a), 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the 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); *see 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 a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis 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 the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 969 F.2d 977-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), cert denied, 506 U.S. 1050 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.304, the administrative law judge properly found that the evidence failed to establish the existence of complicated pneumoconiosis because the administrative law judge permissibly found the reading of complicated pneumoconiosis by Dr. Byers, a B-reader, was outweighed by the other relevant evidence, including negative readings by Drs. Wheeler and Scott, dually qualified physicians. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). We, therefore, affirm the administrative law judge's finding that the evidence failed to establish the existence of complicated pneumoconiosis, 20 C.F.R. §718.304; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*); *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), and, therefore, affirm the administrative law judge's finding that employer established a mistake in a determination of fact sufficient to warrant modification of the previous award. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Further, pursuant to the miner's claim, the administrative law judge properly found that the evidence of record failed to establish the existence of simple pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4); *see Adkins*, *supra*; *Wilt*, *supra*; *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d

Cir. 1993). Likewise, the administrative law judge properly found that total disability was not established since the pulmonary function and blood gas studies of record produced non-qualifying values[3] and the opinions of Drs. Berry and Sargent were unreasoned. *See Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's denial of benefits on the miner's claim pursuant to 20 C.F.R. §§718.202(a) and 718.204(c)(1)-(4), now 718.204(b)(2)(i)-(iv).

Pursuant to the survivor's claim, in addition to finding that the evidence failed to establish the existence of pneumoconiosis, *see Trumbo*, *supra*, the administrative law judge also found no evidence to establish that pneumoconiosis hastened the miner's death. Decision and Order at 13; Employer's Exhibits 5, 6, 7. Thus, as none of the evidence established a connection between the miner's death and pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish that pneumoconiosis hastened the miner's death, and is therefore insufficient to support a finding of entitlement on the survivor's claim. 20 C.F.R. §718.205(c); *Shuff*, *supra*; *Neeley*, *supra*.

[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Accordingly, the administrative law judge's Decision and Order On Second Remand- Denying Benefits on both the miner's and the survivor's claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge