

BRB No. 11-0357 BLA

JANICE BROWN)
(o/b/o BOBBY G. BROWN, deceased))
)
 Claimant-Petitioner)
)
 v.)
)
 PERFORMANCE COAL COMPANY)
)
 and)
) DATE ISSUED: 02/16/2012
 A.T. MASSEY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (10-BLA-5229) of Administrative Law Judge Richard A. Morgan denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended* by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a miner's claim filed on June 21, 2004.²

In a Decision and Order dated September 21, 2006, Administrative Law Judge Daniel F. Solomon found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The Board subsequently affirmed Judge Solomon's denial of benefits. *J.B. [Brown] v. Performance Coal Co.*, BRB No. 06-0987 BLA (July 25, 2007)(unpub.). Claimant filed a request for modification on September 7, 2007.

After crediting the miner with at least twenty-five years of coal mine employment,³ Administrative Law Judge Richard A. Morgan (the administrative law judge) found that the autopsy evidence and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). Weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).⁴ In light of this finding, the administrative law judge held that claimant established that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, considered the merits of the miner's 2004 claim.

¹ The miner died on June 13, 2005. Decision and Order at 2 n.2. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

² Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claim in this case, because it was filed before January 1, 2005.

³ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁴ The administrative law judge found that the evidence established the existence of clinical pneumoconiosis, but did not establish the existence of legal pneumoconiosis. Decision and Order at 17. Because claimant does not challenge the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis, this finding is affirmed. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

The administrative law judge determined that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. The administrative law judge found that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), but did not establish that the miner's total disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's total disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁵

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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*).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In considering whether the evidence established that the miner's total disability was due to clinical pneumoconiosis, the administrative law judge considered the opinions of Drs. Mullins, Hippensteel, Spagnolo, and Crisalli. Dr. Mullins opined that seventy-five percent of the miner's totally disabling pulmonary impairment was due to his clinical pneumoconiosis, *i.e.*, coal workers' pneumoconiosis/silicosis. Director's Exhibit 12 at 4. Conversely, Drs. Hippensteel, Spagnolo, and Crisalli each opined that the minimal amount of clinical pneumoconiosis

⁵ Because no party challenges the administrative law judge's finding of at least twenty-five years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b), these findings are affirmed. *Skrack*, 6 BLR at 1-711.

revealed at autopsy did not contribute in any way to the miner's pulmonary disability. Employer's Exhibits 3, 4 at 12, 5 at 10. These physicians attributed the miner's pulmonary disability to his cigarette smoking-induced emphysema. *Id.*

In considering whether the evidence established that the miner's total disability was due to clinical pneumoconiosis, the administrative law judge accorded less weight to Dr. Mullins's opinion because it was "partially based on the [x]-ray reading by Dr. Patel which indicated complicated pneumoconiosis." Decision and Order at 21. The administrative law judge found that the remaining physicians, Drs. Hippensteel, Spagnolo, and Crisalli, opined that the miner's clinical pneumoconiosis did not contribute to his pulmonary disability. *Id.* The administrative law judge, therefore, determined that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

Claimant argues that the administrative law judge erred in according less weight to Dr. Mullins's opinion. We agree. The administrative law judge's sole basis for according less weight to Dr. Mullins's opinion, that the miner's totally disabling pulmonary impairment was due to clinical pneumoconiosis, is that the doctor's opinion was partially based on a positive x-ray interpretation for complicated pneumoconiosis. Part of Dr. Mullins's examination of the miner was Dr. Patel's interpretation of a July 28, 2004 x-ray as positive for simple pneumoconiosis. Director's Exhibit 12. Dr. Patel's reading included a notation that there was an "[i]ll defined density in the left upper lung indeterminate for lung neoplasia or developing large opacity of complicated pneumoconiosis." *Id.* Although Dr. Mullins noted the presence of a density in the miner's left upper lobe, and Dr. Patel's differential diagnosis of complicated pneumoconiosis, a review of Dr. Mullins's medical report does not reveal that the doctor based her disability causation finding on a finding of complicated pneumoconiosis. Because the administrative law judge mischaracterized Dr. Mullins's opinion, we vacate his finding that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remand the case for further consideration. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

On remand, the administrative law judge should weigh the opinions of Drs. Mullins, Hippensteel, Spagnolo, and Crisalli, and provide a basis for his finding as to whether the medical opinion evidence establishes that the miner's total disability was due to clinical pneumoconiosis. 20 C.F.R. §718.204(c); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge