

BRB No. 00-0381 BLA

MARY M. VANDERGRIFF)
(Widow of HOMER C. VANDERGRIFF))

Claimant-Respondent)

v.)

JEWEL RIDGE MINING)
CORPORATION/)
SEA "B" MINING COMPANY)

Employer-Petitioner)

and)

EMPLOYERS SERVICE)
CORPORATION, ADMINISTRATOR)

Carrier)

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 Allowing Living Miner's Benefits and Survivor's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp, Lebanon, Virginia, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Allowing Living Miner's

Benefits and Survivor's Benefits (97-BLA-1441) of Administrative Law Judge Richard K. Malamphy on a miner's and a survivor's 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 is before the Board for the second time. In his earlier Decision and Order-Awarding Benefits [on Modification], the administrative law judge credited the miner with at least eighteen years of coal mine employment and concluded that the miner established the existence of pneumoconiosis. Decision and Order-Awarding Benefits, No. 97-BLA-1441 (May 18, 1998). The administrative law judge also found that the miner demonstrated the presence of a totally disabling respiratory impairment due at least in part to pneumoconiosis at 20 C.F.R. §718.204(c), (b) and thus, established a change in conditions at 20 C.F.R. §725.310. The administrative law judge further found the miner entitled to the presumption at 20 C.F.R. §718.203(b). In the survivor's claim, the administrative law judge found the evidence of record sufficient to establish that pneumoconiosis substantially

¹ Claimant, Mary Vandergriff, is the widow of Homer Vandergriff, the miner, who died on April 16, 1996 from disseminated aspergillosis due to immunosuppression, rheumatoid arthritis and coal workers' pneumoconiosis. Director's Exhibits 152, 173. The prior appeal and the instant appeal encompass the awards of benefits in both the miner's and survivor's claim. The miner initially filed for benefits on October 30, 1984. Director's Exhibit 1. Following a hearing on the merits, Administrative Law Judge Giles McCarthy issued a Decision and Order on February 7, 1989 denying benefits in the miner's claim. Director's Exhibit 38. Judge McCarthy found the evidence of record sufficient to establish the existence of pneumoconiosis arising out at coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), but insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b). *Id.*

The miner timely requested modification on September 19, 1989, which the district director denied. Director's Exhibits 39, 71, 73-75. Following a hearing, Administrative Law Judge Robert Mahoney found the newly submitted evidence insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and denied benefits. Director's Exhibit 112. During the pendency of his appeal of Judge Mahoney's decision; the miner again requested modification on March 3, 1995, which the district director denied after dismissal of the appeal by the Board. Director's Exhibits 113, 119, 121, 134. Before the miner's requested hearing was held, the miner's counsel requested that the Office of Administrative Law Judges remand the miner's claim to the district director following the death of the miner. Director's Exhibit 148. Upon reconsideration of the new evidence, the district director again denied modification on January 30, 1997. Director's Exhibit 163.

Claimant filed her survivor's claim on October 18, 1996. Director's Exhibit 167. The district director found claimant entitled to benefits. Director's Exhibit 185.

contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded in both the miner's and survivor's claim. The Board affirmed, as unchallenged on appeal, the administrative law judge's finding on length of coal mine employment, his implicit finding that the miner suffered from pneumoconiosis, his findings at 20 C.F.R. §§718.203(b), 718.204(c), and his finding of a change in conditions pursuant to 20 C.F.R. §725.310. The Board, however, vacated the findings of the administrative law judge at 20 C.F.R. §§718.204(b) and 718.205(c) and remanded this case for further consideration. *See Vandergriff v. Jewell Ridge Mining Corporation/Sea "B" Mining Company*, BRB No. 98-1218 BLA (June 16, 1999)(unpub.).

On remand, the administrative law judge again found the evidence of record in the miner's claim sufficient to establish that the miner's totally disabling respiratory impairment was caused by his pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). In the survivor's claim, the administrative law judge found that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were again awarded in both the miner's and survivor's claims.

On appeal, employer challenges the findings of the administrative law judge at 20 C.F.R. §§718.204(b) and 718.205(c). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate 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 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 prove 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, 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*).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of

² We affirm the findings of the administrative law judge at 20 C.F.R. §718.203(b) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit has held that any condition that hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c)(2). *See Shuff, supra*.

Employer contends that the administrative law judge erred in shifting the burden of establishing causation to the employer, rather than placing it on claimant, and erred in finding that causation was established at Section 718.204(b). Specifically, employer contends that the opinions of Drs. Fino, Castle, Surratt and Sargent, which excluded pneumoconiosis as a substantially contributing cause of the miner's pulmonary disability, were sufficient to show that pneumoconiosis was not a causative factor in the miner's disability and that, contrary to the administrative law judge's finding, the physicians' opinions should not have been rejected because they did not identify with certainty the cause of the miner's respiratory disability. Employer's Brief at 3-4.

In finding the evidence of record sufficient to establish causation, the administrative law judge did not err in according greater weight to the causation opinions of Drs. Rasmussen and Robinette, as he found them more persuasive. The administrative law judge did not err when he accorded less weight to the opinions of Drs. Sargent, Fino and Castle, as these physicians did not diagnose coal workers' pneumoconiosis in their reports and based their conclusions that the miner's totally disabling respiratory impairment was not related to an occupational disease on their belief that the miner did not have coal workers' pneumoconiosis. *See* Director's Exhibits 94, 105, 179. Because the administrative law judge concluded that pneumoconiosis had been established based on the evidence of record and the previous Decisions and Orders of record, and because he found that Drs. Robinette and Rasmussen clearly stated that coal workers' pneumoconiosis was a dominant factor in causing the miner's totally disabling respiratory impairment, and the other physicians were not specific as to the cause of the major lung disorder, he permissibly accorded less weight to the opinions of Drs. Fino, Castle, Surratt and Sargent, as the basis for their conclusions conflicted with the administrative law judge's finding regarding the existence of pneumoconiosis. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-84 (4th Cir. 1995)(*Hobbs II*). We, therefore, affirm the finding of the administrative law judge at Section

³ Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

718.204(b) and the award of benefits on the miner's claim as it is supported by substantial evidence.

Employer also contends that claimant failed to satisfy her burden of establishing that pneumoconiosis caused the miner's death. Contrary to employer's argument at Section 718.205(c) in the survivor's claim, however, the administrative law judge properly found that claimant met her burden of proving that pneumoconiosis was a substantially contributing cause of the miner's death. *Id.* In so doing, the administrative law judge permissibly credited the opinions of Drs. Crouch, Stefanini and Buddington, pathologists, all of which found that pneumoconiosis was at least a substantially contributing factor in the miner's death, over the opinions of Drs. Caffrey and Hansbarger, pathologists, who concluded that the miner's pneumoconiosis was too mild to have played a role in his death. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 175-177, 192, 194; Employer's Exhibit 1. The administrative law judge noted that Dr. Robinette, who is Board-certified in internal medicine and pulmonary diseases, agreed with the determinations of Drs. Crouch, Stefanini, and Buddington that pneumoconiosis was a substantially contributing factor in the miner's death and that Dr. Fino, who is also Board-certified in internal medicine and pulmonary diseases, agreed with Drs. Caffrey and Hansbarger that the miner's death was not related to coal workers' pneumoconiosis. *See* Director's Exhibit 153; Employer's Exhibit 5. In weighing the evidence, the administrative law judge permissibly found that the effects of coal workers' pneumoconiosis and aspergillus were difficult to separate and that he was persuaded by a preponderance of the credible medical opinion evidence that pneumoconiosis was a substantially contributing cause of the miner's death. *See Shuff, supra.* Thus, the administrative law judge did not err in finding that claimant met her burden of proving that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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). We, therefore, affirm the finding of the administrative law judge at 20 C.F.R. §718.205(c) and the award of benefits on the survivor's claim as it is supported by substantial evidence.

Accordingly, the Decision and Order On Remand Allowing Living Miner's Benefits and Survivor's Benefits of the administrative law judge is affirmed.

SO ORDERED.

⁴ Drs. Stefanini, Buddington, Caffrey, and Hansbarger are Board-certified in Clinical and anatomical pathology. *See* Director's Exhibits 176A, 177, 192. Dr. Crouch is Board-certified in Anatomical pathology and is a Professor of Pathology at Washington University in St. Louis, Missouri. *See* Director's Exhibit 194.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge