

BRB Nos. 09-0299 BLA  
and 09-0404 BLA

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|---------------------------------|---|-------------------------|
| SANDRA J. GODDARD               | ) |                         |
| (o/b/o and Widow of BENJAMIN F. | ) |                         |
| GODDARD)                        | ) |                         |
|                                 | ) |                         |
| Claimant-Respondent             | ) |                         |
|                                 | ) |                         |
| v.                              | ) | DATE ISSUED: 01/08/2010 |
|                                 | ) |                         |
| ANTELOPE COAL COMPANY           | ) |                         |
|                                 | ) |                         |
| Employer-Petitioner             | ) |                         |
|                                 | ) |                         |
| 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 Richard K. Malamphy,  
Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia,  
for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-6682 and 04-  
BLA-6683) of Administrative Law Judge Richard K. Malamphy awarding benefits on a  
miner's claim 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).<sup>1</sup> This case is before the Board for the second time. In his original Decision and Order, the administrative law judge credited the miner with at least ten years of coal mine employment,<sup>2</sup> found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and found that the medical opinion evidence established the existence of legal pneumoconiosis<sup>3</sup> in the form of idiopathic pulmonary fibrosis (IPF) that was due to, or aggravated by, dust exposure in the miner's coal mine employment, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further determined that employer did not rebut the presumption of 20 C.F.R. §718.203(b), that the miner's clinical pneumoconiosis arose out of coal mine employment. Additionally, the administrative law judge found that the miner was totally disabled by a respiratory impairment that was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's and survivor's claims.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), but because the administrative law judge's findings that the miner's disability and death were due to pneumoconiosis were based on his finding of legal pneumoconiosis, pursuant to Section 718.202(a)(4), the Board considered employer's challenges to that finding. *S.G. [Goddard] v. Antelope Coal Co.*, BRB No. 07-0750 BLA slip op. at 3-5 (May 29, 2008)(unpub.). Finding merit in employer's allegations of error, the Board vacated the administrative law judge's finding of legal pneumoconiosis and remanded the case for him to (1) address whether the opinions of Drs. Bennett, Smith, and Perper attributing the miner's IPF to coal dust exposure were

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<sup>1</sup> Claimant is the widow of the miner. The miner filed a claim for black lung benefits on April 8, 2002. Director's Exhibit 2. While his claim was pending, the miner died on October 12, 2003. Director's Exhibit 41. Subsequently, claimant filed a survivor's claim for benefits on November 12, 2003. Director's Exhibit 40. These claims have been consolidated for decision.

<sup>2</sup> The law of the United States Court of Appeals for the Tenth Circuit is applicable as the miner was last employed in the coal mining industry in Wyoming. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

adequately reasoned; (2) explain why he found their opinions to be more persuasive than the contrary opinions of Drs. Repsher and Rosenberg, taking into account the physicians' respective qualifications and the reasoning of their opinions; (3) to consider the entirety of Dr. Repsher's opinion; and (4) to consider the treatment records of Drs. Portnoy and Brown addressing the etiology of the miner's lung fibrosis.<sup>4</sup> *Id.* at 5-6. In addition, the Board vacated the administrative law judge's finding that employer did not rebut the presumption at Section 718.203(b) and instructed him to consider the conflicting evidence regarding the source of the miner's clinical pneumoconiosis. *Id.* at 6-7 and n.5. Because the Board vacated the administrative law judge's finding of legal pneumoconiosis, the Board also vacated his findings that the miner's total disability and death were due to pneumoconiosis at Sections 718.204(c) and 718.205(c), and instructed him to reconsider those issues on remand.<sup>5</sup> *Id.* at 7-8.

On remand, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and found that employer did not rebut the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). The administrative law judge reiterated his finding that the evidence established total disability pursuant to Section 718.204(b)(2), but he did not address the cause of the miner's total disability pursuant to Section 718.204(c). The administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and awarded benefits on both the miner's and the survivor's claims.

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<sup>4</sup> Drs. Portnoy and Brown diagnosed the miner with pulmonary fibrosis likely related to idiopathic pulmonary fibrosis, and noted that there was no evidence of pneumoconiosis on his lung biopsy. They noted that the miner had "long-standing exposure to coal and uranium dusts," and opined that "[a]lthough these cannot be excluded as possible exacerbating etiologies of his pulmonary fibrosis, with no pathologic evidence of either pneumoconiosis or hypersensitivity pneumonitis, his fibrosis cannot be attributed to these exposures." Director's Exhibit 16.

<sup>5</sup> The Board affirmed, as unchallenged, the administrative law judge's length of coal mine employment finding and his finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). Further, the Board held that any error in the administrative law judge's finding that the existence of pneumoconiosis was not established by the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2) was harmless, as employer was not prejudiced. Additionally, the Board rejected employer's argument that the administrative law judge was required to weigh together all types of evidence submitted under 20 C.F.R. §718.202(a)(1)-(4) before finding that the existence of pneumoconiosis was established. *S.G. [Goddard] v. Antelope Coal Co.*, BRB No. 07-0750 BLA slip op. at 2 n.2, 3-4 (May 29, 2008)(unpub.).

On appeal, employer asserts that the administrative law judge did not comply with the Board's remand instructions and made additional errors in his analysis of the medical evidence. Employer requests that this case be assigned to a new administrative law judge on remand. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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).

To be entitled to benefits under the Act, the miner had to demonstrate by a preponderance of the evidence that he was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered 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 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 874, 20 BLR 2-334, 2-340 (10th Cir. 1996).

We agree with employer that the administrative law judge's Decision and Order on Remand does not adequately comply with the Board's instructions. Accordingly, we vacate the administrative law judge's decision and remand this case for further consideration.

Pursuant to Section 718.202(a)(4), after summarizing the medical opinions on the etiology of the miner's IPF, the administrative law judge addressed the credibility of portions of the opinions of Drs. Repsher and Perper, and stated that he "defer[red] to the opinions of Drs. Bennett and Smith as these physicians provided treatment to the miner. It is concluded that . . . IPF falls within the definition of" pneumoconiosis.<sup>6</sup> Decision and

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<sup>6</sup> The administrative law judge's analysis of the medical opinions on the legal pneumoconiosis issue under Section 718.202(a)(4) was as follows:

Order on Remand at 6. As employer contends, the administrative law judge, on remand, did not address whether the medical opinions he credited were adequately reasoned, as the Board instructed him to do. *Goddard*, slip op. at 5-6. Additionally, the administrative law judge did not consider the entirety of Dr. Repsher's opinion that the miner's IPF was unrelated to coal dust exposure, or explain the weight he accorded to Dr. Rosenberg's opinion, or to those of Drs. Portnoy and Brown. *Id.* Further, as employer contends, the administrative law judge erred in deferring to the opinions of Drs. Bennett and Smith solely because they treated the miner.<sup>7</sup> See 20 C.F.R. §718.104(d)(5). Finally,

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Initially it is noted that Dr. Repsher, a B-reader, stated that X-rays were negative although the majority of other B-readers reached an opposite conclusion. In addition, Dr. Perper, a pathologist, reported biopsy findings of CWP contrary to other reviewers. In this case, Dr. Bennett, a neutral party, examined the miner, reported CWP on X-ray and indicated that[:]

Coal dust exposure is likely to have contributed to his lung disease, both to his pulmonary fibrosis and to his possible concomitant pneumoconiosis.

Dr. Smith provided extensive treatment and concluded that coal dust exposure contributed to the miner's lung disease. While Dr. Perper's opinion as to the presence of CWP on biopsy must be discounted, the physician pointed out that an interstitial fibrosis type CWP has been recognized. Numerous pathologists in this case have discounted the presence of clinical CWP. Drs. Rosenberg and Repsher have stated that neither clinical nor legal CWP has been shown. However . . . Dr. Repsher's opinion is tainted by his holding regarding the X-ray findings. The undersigned defers to the opinions of Drs. Bennett and Smith as these physicians provided treatment to the miner. It is concluded that in this case, IPF falls within the definition of CWP, meeting the criteria in 20 C.F.R. §718.202(a)(4).

Decision and Order on Remand at 5-6.

<sup>7</sup> Employer asserts that the administrative law judge erred in finding that Dr. Bennett was a treating physician and that she was a "neutral party." On remand, the administrative law judge noted that Dr. Bennett is a family practitioner and that she examined the miner "at the request of the black lung program." Decision and Order on Remand at 3. The administrative law judge referred to Dr. Bennett as "a neutral party," and he deferred to her opinion because she treated the miner. Decision and Order on Remand at 3, 5. As employer asserts, the administrative law judge erred by finding that Dr. Bennett treated the miner; the record reflects that she examined the miner once. See

the administrative law judge did not consider the physicians' respective credentials in weighing the medical opinions. *See Goddard*, slip op. at 6. Because the administrative law judge failed to comply with the Board's instructions in analyzing the evidence regarding the existence of legal pneumoconiosis, we must vacate his findings at Section 718.202(a)(4), and remand the case for him to reconsider this issue consistent with the Board's prior instructions.<sup>8</sup>

Turning to the cause of the miner's clinical pneumoconiosis under Section 718.203(b), the administrative law judge, on remand, found that "[e]mployer has not rebutted the presumption that the Miner's clinical pneumoconiosis arose out of his coal mine employment." Decision and Order on Remand at 6. As employer contends, the administrative law judge reached this conclusion without addressing the conflicting evidence on this issue as previously instructed by the Board. *Goddard*, slip op. at 6-7 and n.5. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.203(b), and instruct him to reconsider whether employer has rebutted the presumption that the miner's clinical pneumoconiosis arose out of coal mine employment.<sup>9</sup>

Pursuant to Section 718.204(c), employer accurately notes that the administrative law judge, on remand, did not make a finding as to the cause of the miner's disability, as instructed by the Board. On remand, the administrative law judge must address this element of entitlement pursuant to the Board's prior instructions. *Goddard*, slip op. at 7.

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20 C.F.R. §718.104(d)(1)-(4); Employer's Exhibit 3 at 12. Moreover, the administrative law judge should not characterize Dr. Bennett as "neutral," or accord her opinion greater weight, based solely on her status as the Department of Labor's examining physician. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*).

<sup>8</sup> We decline to address employer's renewed assertion that the administrative law judge erred by failing to weigh together all of the evidence presented at Section 718.202(a)(1)-(4) before reaching a conclusion that the evidence established the existence of pneumoconiosis. The Board rejected that assertion in its previous decision, and the Board's holding constitutes the law of the case with regard to this issue. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Employer has shown no basis for an exception to the doctrine. *See Williams*, 22 BRBS at 237.

<sup>9</sup> The rebuttable presumption of Section 718.203(b) applies only to claims of clinical pneumoconiosis, not legal pneumoconiosis. *Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06, 23 BLR 2-332, 2-342-43 (10th Cir. 2006).

Pursuant to Section 718.205(c), the administrative law judge, on remand, discounted the opinions of Drs. Repsher and Rosenberg that the miner's death was unrelated to pneumoconiosis, because neither physician diagnosed pneumoconiosis. He credited the opinions of Drs. Perper, Bennett, and Smith to find that the miner's death was due to pneumoconiosis. Decision and Order on Remand at 7. Because the administrative law judge based his determinations upon his findings at Section 718.202(a)(4), which we have vacated, we also vacate the administrative law judge's findings pursuant to Section 718.205(c). On remand, the administrative law judge must reconsider the medical opinion evidence, and resolve the conflicts as to whether pneumoconiosis caused or hastened the miner's death, and set forth a rationale explaining his credibility determinations. *See Goddard*, slip op. at 7-8.

Finally, employer requests that this case be remanded to a different administrative law judge because the case has reached the point of "gridlock." Employer's Brief at 36. We deny employer's request. In the absence of evidence of bias on the administrative law judge's part, and in light of the guidance set forth in the Board's remand instructions, employer has identified no compelling reason to order the assignment of this case to a different administrative law judge. *See generally Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion and the Board's previous opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge