

BRB No. 93-1779 BLA

MILDRED HAYNES TAYLOR)
(Widow of JAMES HAYNES))
)
Claimant-Petitioner)
)
v.)
)
PEABODY COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE) DATE ISSUED:
COMPANY)
)
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

E. F. Martin, Hartford, Kentucky, for claimant.

Sirina Tsai (Arter & Hadden), Washington, D.C., for employer.

Before: , and , Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (87-

BLA-0210) of Administrative Law Judge Robert D. Kaplan denying benefits on a 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). The miner filed a claim for benefits on May 24, 1978. After the miner's death on June 12, 1981, claimant filed a survivor's claim on February 27, 1986. In the initial Decision and Order, Administrative Law Judge W. Ralph Musgrove credited the miner with at least twenty-seven years of coal mine employment and found the evidence of record insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). The administrative law judge further found that the miner was not entitled to benefits pursuant to 20 C.F.R. Part 410, Subpart D or 20 C.F.R. §410.490 and that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on both the miner's and the survivor's claims. On appeal, the Board affirmed the administrative law judge's findings as to the length of the miner's coal mine employment and that the miner failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4), and, consequently, the denial of benefits pursuant to 20 C.F.R. Part 727. The Board then remanded the case for the administrative law judge to consider the miner's claim pursuant to 20 C.F.R. Part 718. Upon considering the survivor's claim, the Board vacated the denial of benefits on the survivor's claim and remanded the case for the administrative law judge to consider the survivor's claim pursuant to 20 C.F.R. §718.205(b). *See Haynes v.*

Peabody Coal Co., BRB No. 88-3411 BLA (Jun 17, 1992)(unpub.). On remand, the administrative law judge found that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(b). Accordingly, benefits were again denied on both the miner's and the survivor's claims. On appeal, claimant generally contends that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and in denying benefits on both the miner's and the survivor's claims. Employer responds in support of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

On appeal, claimant generally contends that the administrative law judge erred in weighing the x-ray evidence of record. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly stated that the Board had previously affirmed Administrative Law Judge Musgrove's finding that the x-ray evidence of record is

insufficient to establish the existence of pneumoconiosis and properly relied upon it as law of the case. See Decision and Order on Remand at 2; *Haynes, supra*; *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Also, claimant's reliance on the true doubt rule is improper as the United States Supreme Court has held that the true doubt rule may no longer be applied in the weighing of the evidence of record to assist a claimant in meeting his burden of proof. See [*Ondecko*], *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub. nom., Greenwich v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3rd Cir. 1993). As a result, the administrative law judge's finding that the miner failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) is affirmed.

Claimant also generally contends that the administrative law judge erred in finding Dr. Kremzar's autopsy finding of anthracotic pigment insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). However, the Board has held that where an autopsy contains findings of anthracotic pigment, the question of whether those findings constitute pneumoconiosis is a finding of fact to be made by the administrative law judge. See *Lykins v. Director, OWCP*, 819 F.2d 146, 10 BLR 2-129 (6th Cir. 1987); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). In this case, the administrative law judge permissibly stated that the autopsy evidence was the most reliable evidence as to the existence of pneumoconiosis and permissibly found that Dr. Kremzar's finding of anthracotic pigment is insufficient to establish the existence of pneumoconiosis. See Decision

and Order at 2-3; Director's Exhibit 24; *Lykins, supra*; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Peskie, supra*. As a result, the administrative law judge's finding that the miner failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) is affirmed.

Additionally, claimant generally contends that the administrative law judge erred in his weighing of the medical opinion evidence of record pursuant to 20 C.F.R. §718.202(a)(4). Specifically, claimant states that the record contains three medical opinions that diagnose pneumoconiosis and only one that does not. See Claimant's Brief at 5; Director's Exhibits 8, 17, 18, 19, 24. However, the administrative law judge erroneously failed to consider the medical opinion evidence pursuant to Section 718.202(a)(4). See *Perry v. Director, OWCP* 9 BLR 1-1 (1986). As a result, the administrative law judge's denial of benefits on the miner's claim is vacated and the case is remanded for the administrative law judge to consider the medical opinion evidence of record pursuant to Section 718.202(a)(4).

Claimant makes no specific contentions of error regarding the administrative law judge's denial of benefits on the survivor's claim pursuant to 20 C.F.R. §718.205(b), however, the administrative law judge permissibly found that none of the applicable presumptions are invoked in this case. See Decision and Order on Remand at 3-4. The administrative law judge also permissibly found that both the autopsy and the death certificate, which listed the cause of death as metastatic bowel cancer, indicate that the miner's death was not due to pneumoconiosis and

that this evidence does not show that the miner suffered from pneumoconiosis. See Decision and Order on Remand at 3-4; Director's Exhibit 24; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). As a result, the administrative law judge's denial of benefits on the survivor's claim pursuant to Section 718.205(b) is affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in-part, vacated in-part and remanded for further consideration consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge