BRB No. 01-0832 BLA

IMAJEAN PRICE (Widow of HALBERT D. PRICE)	)	
Claimant-Respondent	)	
v.	)	
BETHENERGY MINES INCORPORATED	)	DATE ISSUED:
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 Second Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

William D. Turner (Crandall, Pyles, Haviland & Turner, LLP), Lewisburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly, PLLC), Charleston, 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 Second Remand (1997-BLA-527 and 1997-BLA-528) of Administrative Law Judge Richard A. Morgan awarding benefits on claims[1] filed by the miner and survivor pursuant to the provisions of Title IV of the Federal

[1]Claimant is Imajean Price, the miner's widow. The miner, Halbert D. Price, filed an application for benefits on June 8, 1994. Director's Exhibit 1. The miner died on January 27, 1996 and claimant filed a survivor's claim on July 22, 1996. Director's Exhibit 50;

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] This case has been before the Board previously. In the original decision, the administrative law judge found at least twenty-three years of coal mine employment. Decision and Order dated October 6, 1997 at 4. Considering entitlement in these claims filed by the miner and survivor pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the record evidence was sufficient to establish that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). Decision and Order dated October 6, 1997 at 33-37. The administrative law judge noted that the parties stipulated that the miner was totally disabled at the time of his death, found that the disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000), and further found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Decision and Order dated October 6, 1997 at 37-41. Accordingly, benefits were awarded in both claims. On appeal, the Board affirmed the administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b) and 718.205 (2000) and remanded the case for further consideration of the relevant evidence of record. *Price v. Bethenergy Mines, Inc.*, BRB No. 98-0271 BLA (November 12, 1998)(unpublished).

On remand, the administrative law judge considered the relevant evidence and concluded that it was sufficient to establish that the miner was totally disabled due to pneumoconiosis and that the miner's death was due to pneumoconiosis. Accordingly, benefits were awarded in both claims. Decision and Order on Remand dated March 29, 1999 at 4-16. Employer appealed and the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b) and 718.205 (2000) and remanded the case for additional findings. *Price v. Bethenergy Mines, Inc.*, BRB No. 99-0806 BLA (September 29,

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Survivor's Claim Director's Exhibit 1.

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

2000)(unpublished).

On second remand, the administrative law judge found that the evidence of record established that the miner's total disability and death were due to pneumoconiosis and thus claimant was entitled to benefits. Decision and Order on Second Remand at 3-11. Accordingly, benefits were awarded in the miner's and survivor's claims. In the instant appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's total disability and death were due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, 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 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 the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any one of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).[3]

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West

Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Second Remand, 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 therein. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Employer contends that the administrative law judge erred in finding that the miner's total disability and death were due to pneumoconiosis as he failed to properly weigh the evidence of record. Employer's Brief at 18-34. Specifically, employer contends that the administrative law judge impermissibly accorded greater weight to the opinion of Dr. Green and less weight to the contrary opinions of record. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Initially, we disagree with employer's contention that in rejecting the contrary medical opinions of record at 20 C.F.R. §§718.204(b) and 718.205 (2000), the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).[4] The administrative law judge, in the instant case, discussed the evidence of record and articulated a rational reason for not relying on the conclusions of these doctors. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order on Second Remand at 4-11.

In its previous Decision and Order, the Board vacated the administrative law judge's weighing of the medical opinion evidence pursuant to Sections 718.204(b) and 718.205 (2000) since the administrative law judge did not fully consider all the evidence of record, adequately explain his rationale and consider the physicians' reasoning without substituting his own opinion for the medical experts. The Board specifically instructed the administrative law judge to discuss and compare the documentation offered by the physicians and to

[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

reconsider this evidence in determining whether claimant established that the miner's disability and death were due to pneumoconiosis. *Price, supra*. On remand, the administrative law judge concluded that the opinion by Dr. Green was well-reasoned and documented. Decision and Order on Second Remand at 10. The administrative law judge further noted that the opinion of Dr. Green was , at least partially, buttressed by the opinions of Dr. Plata, the prosector, Dr. Garretson, the miner's treating physician, Dr. Fleer, who attended the miner at his death and signed the death certificate, and Dr. Rasmussen, an examining physician. Decision and Order on Second Remand at 10. The administrative law judge, after considering the credibility of the opinions as instructed by the Board, concluded that the opinion of Dr. Green outweighed the contrary opinions of record as this physician offered an opinion most consistent with the credible autopsy evidence of pneumoconiosis and interstitial fibrosis with considerable coal dust deposition and silicate and silica minerals, as well as the miner's extensive history of coal dust exposure. Decision and Order on Second Remand at 10. The administrative law judge further found that Dr. Green's analysis was compelling and logical as he fully explained his opinion and attached various references and a medical abstract which undermined the arguments of the physicians who questioned the presence of pneumoconiosis and/or the role of coal mine dust exposure in interstitial lung disease. Decision and Order on Second Remand at 10-11. The administrative law judge further accorded less weight to the opinions that were ambiguous regarding the existence of pneumoconiosis or completely ruled it out as it undermined the credibility of these physicians. Decision and Order on Second Remand at 10. The administrative law judge concluded, therefore, that claimant met her burden of proof by establishing that pneumoconiosis, as defined in 20 C.F.R. §718.201, was a substantially contributing cause or factor in the miner's total respiratory disability and death pursuant to 20 C.F.R. §§718.204(b) and 718.205 (2000). Decision and Order on Second Remand at 11.

Employer contends that the administrative law judge erred in failing to follow the remand instructions of the Board in reconsidering the medical opinion evidence. In particular, employer contends that the administrative law judge rendered the same credibility determinations that had been previously rejected by the Board.[5] We disagree. Contrary to employer's contention, the administrative law judge did not fail to apply the Board's remand instructions in his consideration of the medical evidence. Rather, the administrative law judge noted the specifics of the Board's holdings and reconsidered the evidence within the

[5]Employer's assertion that the instant case must be remanded yet again as the administrative law judge failed to consider the evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) in determining if the existence of pneumoconiosis is established, lacks merit. The administrative law judge clearly considered all the relevant evidence in finding that pneumoconiosis was established. *See* Decision and Order on Second Remand at 7 n. 3-4.

parameters of those instructions. Decision and Order on Second Remand at 2-11. Contrary to employer's assertion, the administrative law judge rationally reviewed the relevant evidence of record and permissibly found that the opinion of Dr. Green was documented and reasoned. While the administrative law judge again found that the medical opinions that failed to diagnose pneumoconiosis were less credible, he nonetheless properly considered these medical opinions in their entirety. An administrative law judge may, within a reasonable exercise of his discretion, accord less weight to a medical opinion as it fails to adequately address the possibility of coal dust exposure contributing to claimant's respiratory disability. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Kuchwara, supra*; *Piccin, supra*. However, the administrative law judge's Decision and Order, in the instant case, indicates that the administrative law judge found the fact that Dr. Green's report was well-documented and well-reasoned and that the report discussed pneumoconiosis as defined in 20 C.F.R. §718.201, as well as being supported by the medical opinions of Drs. Plata, Garretson, Fleer and Rasmussen and contained various references and a medical abstract, were more important reasons for crediting this report over the contrary opinions of record. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *Kuchwara, supra*; *Piccin, supra*; Decision and Order on Second Remand at 10-11; Director's Exhibits 11, 15, 16, 22, 23, 35, 36, 38, 40, 45, 58; Employer's Exhibits 1-6, 8-12; Claimant's Exhibits 1A, 2A, 2-4. We therefore affirm the administrative law judge's credibility determinations and his according greater weight to Dr. Green's opinion. *See* Decision and Order on Second Remand at 10-11; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-1445 (1984).

Employer further asserts that the administrative law judge erred in finding that claimant's total disability and death were due to pneumoconiosis pursuant to Sections 718.204(b) and 718.205 (2000) in that he failed to accord appropriate weight to the contrary opinions of record. Employer contends that the contrary opinions are entitled to greater weight in light of their numerical superiority and the superior credentials of the authors. We disagree. Although an administrative law judge may assign more weight to a physician's opinion based on his qualifications or the numerical weight of the evidence, the administrative law judge, is not obligated to do so. *See Trumbo, supra*; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark, supra; Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). Rather, the administrative law judge must consider the reliability and credibility of the relative evidence in rendering his findings. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR 2- (4th Cir. 2000); *Trumbo, supra*; *Clark, supra;*

Worley, supra; *Mabe, supra*.

Employer additionally contends that the administrative law judge erred in relying on the opinion of the autopsy prosector, Dr. Plata. Contrary to employer's assertion, although the administrative law judge may not mechanically accord greater weight based solely upon the physician's status as the autopsy prosector, the administrative law judge is not prohibited from according weight to the opinion based upon more than a mechanical recognition of the physician's status as prosector. *See BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Clark, supra*; *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). The administrative law judge, in the instant case, acted within his discretion as fact-finder in concluding that the opinion of Dr. Plata, in comparison to the contrary opinions of record, was entitled to greater weight as the physician's conclusions were explained and supported by both his microscopic and gross examinations. *Sparks, supra*; *Rowan, supra*; *Piccin, supra*; Director's Exhibit 50; Decision and Order dated October 6, 1997 at 33. Moreover, employer's contention with respect to the weight accorded to Dr. Plata's autopsy findings was addressed by the Board in its prior Decision and Order and thus we decline to further review the administrative law judge's weighing of this evidence as our prior holding constitutes the law of the case. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Price, supra* at 2-4.

As the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm the administrative law judge's findings that claimant has established that the miner's total disability and death were due to pneumoconiosis pursuant to 20 C.F.R. §§718.205 and 718.204(c).[6] *See Roberts v. West Virginia CWP Fund*, 74 F. 3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Shuff, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*; *Worley, supra*. Consequently, we affirm the administrative law judge's award of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Second Remand

[6]The administrative law judge applied the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c). Contrary to employer's contention, the administrative law judge did not retroactively apply the revised regulations, rather he found that claimant established her burden of proof pursuant to Section 718.204(b) (2000). Decision and Order on Second Remand at 11.

awarding benefits in both the miner's and 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