

BRB No. 02-0103 BLA

LOLA MAE ADDINGTON)
(Widow of HASKELL ADDINGTON))
)
Claimant-Petitioner)
)
v.)
)
FOUNTAIN BLUE COAL CORPORATION)
)
and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')) DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)) DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

R. Roland Case, Pikeville, Kentucky, for claimant.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant,¹ appeals the Decision and Order on Remand Denying Benefits (99-BLA-0742) of Administrative Law Judge Thomas F. Phalen, Jr, on 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).² This case is before the Board for the second time. In his initial Decision and Order Awarding Survivor=s Benefits, the administrative law judge credited the miner with at least twenty-two years of coal mine employment and considered the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(4)(2000), and that pneumoconiosis was a substantially contributing cause of the miner=s death pursuant to 20 C.F.R. ' 718.205(c)(2000). Accordingly, he awarded benefits.

On employer=s appeal, the Board affirmed the administrative law judge=s length of coal mine employment finding. The Board affirmed the administrative law judge=s finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1)-(3)(2000). The Board also vacated the administrative law

¹ Claimant is Lola Mae Addington, the widow of Haskell Addington, the miner, who died on October 26, 1997. See Director's Exhibit 11. The miner filed an application for benefits on October 3, 1997, which was denied on January 30, 1998. Director's Exhibit 48. Claimant did not pursue the miner=s claim. The survivor=s claim is the only claim currently being considered.

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.

judge=s finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000), holding that the administrative law judge had impermissibly shifted the burden to employer to establish that coal mine employment did not contribute to the miner=s pulmonary condition. The Board held that the administrative law judge failed to accurately characterize the relevant evidence of record. The Board also held that the administrative law judge erred by failing to adequately explain the bases for his determination that the medical data does not persuasively support the opinions of Drs. Vuskovich, Broudy, Naeye, Kleinerman, Caffrey, Jarboe and Hutchins. In addition, the Board vacated the administrative law judge=s findings at Section 718.205(c)(2000), noting that these findings were based on the administrative law judge=s credibility determination at Section 718.202(a)(4)(2000), and further noting that the administrative law judge had not considered all of the evidence relevant to the cause of the miner=s death, in particular, the opinion of Dr. Kleinerman. Accordingly, the award of benefits was vacated and the case was remanded to the administrative law judge for further consideration. *Addington v. Fountain Blue Coal Corp.*, BRB No. 00-0360 BLA (Jan. 31, 2001)(unpub.).

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), or that the miner=s death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were denied.

On appeal, claimant asserts that there is no rational basis for the Administrative Law Judge to initially award benefits based upon Dr. Perper=s opinion and then to deny benefits on the same evidence he initially had before him.@ Claimant's Brief at 3 (unpaginated). Claimant asserts that Dr. Perper=s opinion is the only independent testimony@ in this case, and contends that the administrative law judge=s reliance on the weight of the evidence is nothing more than counting the number of physicians to testify.@ *Id.* Employer/carrier responds, urging affirmance of the administrative law judge=s denial of benefits. The Director has not filed a brief 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 pursuant to 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.³ 20 C.F.R. ' 718.205(c). See 20 C.F.R. ' ' 718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Pneumoconiosis will be considered a substantially contributing cause of the miner=s death under Section 718.205(c)(5) if the disease actually hastens the miner's death. 20 C.F.R. ' 718.205(c)(5); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

On appeal, claimant contends that the administrative law judge considered the evidence once and found entitlement to benefits, and now, after considering the evidence a second time, he has not Aset the basis@ for the denial of benefits. See Claimant's Brief at 2-3 (unpaginated).

The Board has detailed the impact of a Board decision vacating an administrative law judge=s Decision and Order. The Board stated:

When the Board vacates an administrative law judge=s decision, be

³ 20 C.F.R. ' 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner=s death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at ' 718.304 is applicable.

- (5) Pneumoconiosis is a Asubstantially contributing cause@ of a miner=s death if it hastens the miner=s death.

20 C.F.R. ' 718.205(c)(1)-(3), (5).

it an award or denial of benefits, it annuls or sets aside that decision rendering it of no force or effect. The effect of the Board=s action is to return the parties to the *status quo ante* the administrative law judge=s decision. That is, the parties resume the position together with all rights, benefits and/or obligations they had prior to the issuance of the administrative law judge=s decision.

Dale v. Wilder Coal Co., 8 BLR 1-119, 1-119-20 (1985)(Order).

In view of this case law, we hold that our prior Decision and Order, vacating the administrative law judge=s findings at Sections 718.202(a)(4)(2000) and 718.205(c)(2000), nullified these findings by the administrative law judge. See *Dale*, supra. Therefore, there is no requirement, nor any expectation, that the administrative law judge provide an explanation of any differences or changes in his weighing of the evidence on remand from the Board.

In finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge noted that Dr. Perper is the only physician of record to diagnose the existence of pneumoconiosis, and that all of the other physicians, including three Board-certified pathologists and two Board-certified pulmonary specialists who reviewed the medical evidence, found no evidence of coal workers' pneumoconiosis.⁴

⁴ The only medical opinion of record diagnosing coal workers' pneumoconiosis was authored by Dr. Perper, whose credentials are not contained in the record. Director's Exhibits 14a, 15. Dr. Vuskovich, who is a B-reader, opined that the miner does not have an occupational lung disease caused by his coal mine employment. Director's Exhibit 14. Dr. Broudy, who is Board-certified in Internal Medicine and Pulmonary Medicine stated that he was unable to make a definite diagnosis of coal workers' pneumoconiosis. Director's Exhibit 31. Dr. Naeye, who is Board-certified in Anatomic and Clinical Pathology, stated that the lung tissue does not show coal workers' pneumoconiosis, and disagreed with Dr. Perper=s diagnosis of coal workers' pneumoconiosis. Director's Exhibit 34. Dr. Kleinerman, who is Board-certified in Pathologic Anatomy and Clinical Pathology, opined that the miner did not have coal workers' pneumoconiosis. Director's Exhibits 37, 39. Dr. Caffrey, who is Board-certified in Anatomic Pathology and Clinical Pathology, opined that the miner had no evidence of coal workers' pneumoconiosis. Director's Exhibits 38, 42. Dr. Jarboe, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that the miner did not have coal workers' pneumoconiosis. Director's Exhibit 41. Dr. Hutchins, who is Board-certified in Anatomic Pathology, stated that the miner did not have coal workers'

Decision and Order on Remand at 7. The administrative law judge found the opinions of these physicians, namely Drs. Broudy, Naeye, Kleinerman, Caffrey, Jarboe and Hutchins, to be documented and well reasoned, and entitled to significant weight because of their superior credentials and expertise in pulmonary medicine and pathology. In considering all of the evidence, the administrative law judge found that the weight of the evidence does not support claimant=s burden of establishing the existence of pneumoconiosis. Decision and Order on Remand at 8.

We reject claimant=s suggestion of bias by the physicians whose opinions were submitted by employer. A finding that a physician is biased must be based on the evidence in the record. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Moreover, the Board has held that medical opinions prepared for litigation are appropriate evidence to be considered by the administrative law judge, see *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984), and that the party paying the physician is irrelevant, see *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Inasmuch as there is no foundation in the record for a finding of bias on the part of the physicians, we reject this assertion. See *Melnick, supra*.

In weighing the evidence regarding the existence of pneumoconiosis, the administrative law judge considered the credibility of the medical opinion evidence and the credentials of the physicians providing these opinions. We affirm the administrative law judge=s finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), based on his consideration of the qualifications of the physicians and the preponderance of the evidence. See Decision and Order on Remand; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Inasmuch as we affirm the administrative law judge=s finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement in a survivor=s claim, see *Trumbo, supra*, we also affirm the administrative law judge=s denial of benefits. Therefore, we need not address the administrative law judge=s findings at Section 718.205(c) regarding the cause of the miner=s death.

Accordingly, the administrative law judge=s Decision and Order on Remand Denying Benefits is affirmed.

pneumoconiosis. Director's Exhibit 43.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge