BRB No. 02-0818 BLA

GLORIA NELSON (On behalf of and survivor of LAWRENCE NELSON, JR.)	)	
Claimant-Petitioner	)	
v.	)	
ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY	)	DATE ISSUED: 07/30/2003
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order B Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order B Denying Benefits (02-BLA-0169 and 02-BLA-0170) of Administrative Law Judge Daniel L. Leland (the administrative law judge) rendered on a miner=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] The miner first filed a claim for benefits on November 18, 1992. That claim was denied by Administrative Law Judge Ainsworth H. Brown on August 8, 1994. Judge Brown determined that, although the parties agreed that the miner was totally disabled, the miner failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. On appeal, the Board affirmed Judge Brown=s denial.

The miner filed a duplicate claim on July 26, 1996. Administrative Law Judge Edward Terhune Miller found the existence of pneumoconiosis established and, therefore, found a material change in conditions established. He further found thirteen and three-quarter years of coal mine employment established, that pneumoconiosis arose out of coal mine employment, and that total disability was established, based on employer=s concession, but that total disability due to pneumoconiosis was not established. Benefits were, accordingly, denied on the duplicate claim on February 25, 1998.

The Board affirmed Judge Miller=s findings of thirteen and three-quarters years of coal mine employment and total disability, but vacated Judge Miller=s finding that total disability was not due to pneumoconiosis and remanded the case for the administrative law judge to reconsider all of the medical opinion evidence on that issue in accordance with *Robinson v. Pickands Mather and Co.*, 955 F.2d 1181, 16 BLR 2-27 (8th Cir. 1992) and *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990). *Nelson v. Arch of WV/Apogee Coal Co.*, BRB No. 98-0816 BLA (Mar. 8, 1999)(unpub.).

On remand, Judge Miller again found the evidence insufficient to establish total disability due to pneumoconiosis. Claimant appealed, arguing that Judge Miller erred in relying on several medical opinions which were unreasoned. The Board rejected claimant=s argument, however, holding that Judge Miller=s findings were supported by substantial evidence, and affirmed the denial of benefits. *Nelson v. Arch of WV/Apogee Coal Co.*, BRB No. 00-0374 BLA (Jan. 23, 2001)(unpub.). In a footnote, however, the Board stated that it was vacating the administrative law judge=s finding of the existence of pneumoconiosis and that a material change in conditions had been established because the evidence regarding the existence of pneumoconiosis had not been weighed in accordance with *Island Creek Coal*

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[1] Gloria Nelson, the miner=s widow, is pursuing his claim. The miner, Lawrence Nelson, Jr., died on May 30, 1997. Claimant=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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Co. v. Compton, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). On February 26, 2001, claimant filed a petition for modification. Director=s Exhibit 10.

Claimant, the miner=s widow, filed a separate, survivor=s claim for benefits on June 23, 1997 which was denied by Administrative Law Judge Daniel F. Sutton on August 25, 1998. The denial of the survivor=s claim was affirmed by the Board on January 18, 2000.

In considering claimant=s request for modification of the denial of the miner=s claim based on a mistake of fact, the administrative law judge found that the evidence did not establish that the miner=s total disability was due to pneumoconiosis. The administrative law judge further stated that there was no need for him to readdress whether the existence of pneumoconiosis was established since the evidence failed to establish disability causation, an essential element of entitlement. Accordingly, the request for modification was denied and the miner=s claim for benefits was denied. In her closing brief, claimant also argued that her survivor=s claim for benefits was also before the administrative law judge, based on her February 26, 2001 request for modification. The administrative law judge found that claimant=s argument was without merit, as claimant had made no reference to the survivor=s claim in her request for modification and, even if she had, the request for modification on the survivor=s claim would have been untimely. Accordingly, the administrative law judge found that the survivor=s claim was not before him and did not further address it.

On appeal, claimant contends that the administrative law judge erred when he: (1) found that claimant had not filed a timely request for modification of the denial of her survivor=s claim; (2) failed to address the merits of the survivor=s claim; and (3) failed to address all the evidence relevant in the miner=s claim. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence since the administrative law judge: (1) properly found that the survivor=s claim was not before him; and (2) properly found that the evidence failed to establish a reason to modify the denial of the miner=s claim, since the evidence failed to establish disability causation. The Director, Office of Workers= Compensation Programs (the Director), responds only with respect to the issue of whether claimant filed a timely request for modification of the denial of her survivor=s claim. The Director contends that claimant=s request for modification did not apply to the survivor=s claim because she did not indicate that she was requesting modification of that denial and, even assuming she had requested modification of that denial, the request was not timely since the Board issued its Decision and Order on January 18, 2000 and claimant did not request modification (on the miner=s claim) until February 26, 2001.

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 miner=s claim pursuant to 20 C.F.R. Part 718, claimant must prove the existence of 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*).

Claimant first contends that the administrative law judge erred when he failed to consider the survivor=s claim. We disagree. The administrative law judge correctly found that claimant=s February 26, 2001 request for modification was clearly made solely on the denial of the miner=s claim. There was no reference to the survivor=s claim in the modification request. Further, as the administrative law judge also noted, even if the request had purported to encompass the survivor=s claim, it would not have been timely. As the Director points out, the one-year time period for requesting modification begins to run when the decision that a party seeks to modify becomes effective. *See Wooton v. Eastern Associated Coal Corp.*, 21 BLR 1-194 (1995). The regulations provide that an order of the Benefits Review Board shall become effective when it is issued. 20 C.F.R. ' 725.502(a)(2). Section 22 of the Longshore and Harbor Workers= Compensation Act, 33 U.S.C. ' 922. as incorporated into the Act by 30 U.S.C. ' 932(a), as implemented by 20 C.F.R. ' 725.310 provides in pertinent part that the period in which to request modification is one year after the denial of the claim. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). Thus, since the Board affirmed the administrative law judge=s denial of benefits on the survivor=s claim on January 18, 2000 and claimant did not file a petition for modification until February 26, 2001, the administrative law judge properly found that even if a request for modification on the survivor=s claim had been made, it was untimely. Accordingly, the administrative law judge properly found that the survivor=s claim was not before him.

Claimant next argues that the administrative law judge should have made new findings on the existence of pneumoconiosis since the Board had vacated Judge Miller=s finding of pneumoconiosis and remanded the case for reconsideration in light of *Compton*, 211 F.3d 203. Because the administrative law judge found that the evidence of record did not support a finding that the miner=s total disability was due to pneumoconiosis, however, he did not consider any other elements of entitlement. In finding that disability causation was not established, the administrative law judge cited the standard set forth at 20 C.F.R. ' 718.204(c)(1), considered all the medical opinions of record, and concluded that no mistake in a determination of fact had been made by Judge Miller when he found that disability causation was not established on the miner=s claim. The administrative law judge concluded that Judge Miller properly accorded greater weight to the opinions of board-certified pulmonologists over physicians who did not have those credentials, *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988), and to the opinions of the physicians who had made a more complete review of the miner=s medical record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge properly found that

Judge Miller permissibly accorded less weight to the opinions of physicians who were equivocal, *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge=s finding that claimant failed to establish disability causation on the record is, therefore, affirmed. Because the administrative law judge found that disability causation, an essential element of entitlement, was not established, we will not consider claimant=s contention concerning the existence of pneumoconiosis. *See Trent*, 11 BLR 1-26 (1987); *Perry*, 9 BLR 1-1 (1986).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge