BRB No. 04-0433 BLA

VIVIAN STONE, o/b/o EUGENE R. STONE (deceased)	)	
Claimant-Respondent	)	
v.	)	
ZEIGLER COAL COMPANY	)	DATE ISSUED: 07/19/2005
and	)	
HORIZON NATURAL RESOURCES	)	
Employer/Carrier- Petitioners	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Intervenor	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Reconsideration - Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Gary B. Nelson, Cheryl L. Erdman (Feirich, Mager, Green & Ryan), Carbondale, Illinois, for employer.[1]

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[1] After filing a petition for review and two reply briefs, employer's counsel withdrew from the case.

Fred C. Statum III, Philip L. Robertson (Manier & Herod), Nashville, Tennessee, for intervenor.

Jeffrey S. Goldberg (Howard M. Radzely, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Reconsideration - Awarding Benefits (95-BLA-1623) of Administrative Law Judge Mollie W. Neal rendered 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 procedural history of this case is as follows:

The miner filed an application for benefits on September 9, 1980. Director's Exhibit 22.[2] Administrative Law Judge Leonard R. Lawrence denied benefits on January 29, 1995, based on a finding that the miner did not establish the existence of pneumoconiosis. *Id.* Within one year of the benefits denial, the miner filed a second application on January 10, 1986, which was treated as a request for modification pursuant to 20 C.F.R. §725.310 (2000). The district director denied the modification request on January 23, 1986, and the miner timely requested a hearing on January 31, 1986. *Id.* The record contains no response by the district director to the miner's hearing request.

On January 13, 1987, the miner filed a third application for benefits. *Id.* Although the third application was made within one year of the January 23, 1986 modification denial, the district director did not treat the third application as a modification request, but processed it as a new claim and denied benefits on April 22, 1987. The district director's April 22, 1987 denial letter discussed only the new medical evidence developed with the

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[2] Director's Exhibit 22 is a 253-page exhibit containing the documentation of the miner's first three benefits applications. Because Director's Exhibit 22 is unpaginated and contains unstamped exhibits, we will refer to documents within Director's Exhibit 22 by their date.

miner's 1987 application; it did not mention the miner's prior two claims or their associated evidence.

On August 6, 1990, the miner filed his fourth application for benefits. Director's Exhibit 1. Because the miner filed this application more than one year after the previous denial, the district director processed the fourth application as a duplicate claim and denied benefits pursuant to 20 C.F.R. §725.309(d) (2000). Director's Exhibit 11. The miner requested a hearing, which was held before Administrative Law Judge Glenn R. Lawrence on September 23, 1991. Director's Exhibits 12, 24.

At the hearing, the miner was not represented by counsel. Director's Exhibit 24 at 3. Employer's counsel informed Judge Lawrence that the miner's first claim filed in 1980 might still be pending because the miner was not granted the requested hearing on his 1986 modification request. Director's Exhibit 24 at 6-7. After the hearing, claimant obtained counsel and the parties requested a remand to the district director for the development of additional medical evidence. Director's Exhibit 25. Judge Lawrence granted their request on January 23, 1992. *Id*.

On remand, the district director denied benefits and the miner requested a hearing. Director's Exhibits 29, 31. However, on January 15, 1993, Judge Lawrence issued a Decision and Order denying benefits without holding a hearing. Director's Exhibit 36. In his Decision and Order, Judge Lawrence found that the miner's 1986 modification request was still pending because the district director had not acted on the miner's request for a hearing. Accordingly, Judge Lawrence found that the miner's later claims merged with his still-pending, 1986 modification request. Director's Exhibit 36 at 2. Judge Lawrence denied the modification request, however, because he found that the miner did not establish the existence of pneumoconiosis. Director's Exhibit 36 at 3-5.

The miner timely requested reconsideration of Judge Lawrence's decision. Director's Exhibit 37. He informed Judge Lawrence that he had expected a hearing to be held, and he attached medical evidence that he had intended to submit at the hearing. *Id*. On November 22, 1993, Judge Lawrence set aside his January 15, 1993 decision and remanded the case to the district director for consideration of the miner's additional medical evidence "in light of the petition for modification." Director's Exhibit 38.

On remand, the district director denied modification and the miner timely requested a hearing. Director's Exhibits 42, 44, 52. On October 9, 1994, while the claim was pending before the OALJ, the miner died and his widow later indicated that she would pursue his claim. Employer's Exhibit 1; Claimant's Letter, May 15, 1995. The parties continued to develop and submit medical evidence, including autopsy evidence and medical reports. Director's Exhibits 47-49; Claimant's Exhibit 1; Employer's Exhibits 1-4. At the parties' request for a decision on the record, on April 5, 1996

Administrative Law Judge Mollie W. Neal (the administrative law judge) cancelled the scheduled hearing and set dates for the parties to submit medical evidence and briefs. Decision and Order - Granting Modification at 3, July 31, 1996.

On July 31, 1996, the administrative law judge issued a Decision and Order - Granting Modification in which she admitted the parties' additional submissions into evidence and closed the record. Decision and Order - Granting Modification at 3. The administrative law judge credited the miner with thirty-seven years of coal mine employment[3] and accepted Judge Lawrence's prior finding that the miner's 1986 modification request of his 1980 claim was still pending. Decision and Order - Granting Modification at 4, 5. The administrative law judge found that the miner was totally disabled due to pneumoconiosis as of January 16, 1993, the day after Judge Lawrence's denial of benefits, and granted modification based on a change in conditions. Accordingly, the administrative law judge awarded benefits.

Claimant, the miner's widow, timely moved for reconsideration. Claimant's Motion for Reconsideration, Aug. 30, 1996. Claimant argued that the administrative law judge had not considered whether modification could be granted based on a mistake in a determination of fact, or whether claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.305, based on the September 9, 1980 filing date of the miner's original claim, which was kept alive by his still-pending, 1986 modification request.[4] Claimant's Motion for Reconsideration at 2-7.

Thereafter, the claim file was apparently misplaced, and claimant's motion for reconsideration remained pending before the OALJ for approximately seven and a half years. During this time, employer obtained new counsel, and on July 11, 1997, filed a petition for modification with the district director and submitted additional medical

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[3] The record indicates that the miner's coal mine employment occurred in Illinois. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] For claims filed prior to January 1, 1982, 20 C.F.R. §718.305 provides a rebuttable presumption of total disability due to pneumoconiosis if a miner demonstrates the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(a),(e). The party opposing entitlement may rebut the presumption by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of coal mine employment. 20 C.F.R. §718.305(a).

evidence. Upon being informed by claimant's counsel that the claim was still pending before the administrative law judge on reconsideration, employer's new counsel entered an appearance before the administrative law judge, and, on January 27, 1998, filed a motion for reconsideration. Employer submitted additional medical evidence to the administrative law judge with its motion and requested that she either reconsider her finding that the existence of pneumoconiosis was established, or simply vacate her decision and remand the case to the district director for consideration of employer's additional evidence. Employer's Motion, Jan. 27, 1998. Claimant objected to the submission of additional evidence and to the proposal to remand the case to the district director. Claimant's Response, Jan. 30, 1998.

On January 23, 2004, the administrative law judge issued a Decision and Order on Reconsideration - Awarding Benefits that is the subject of this appeal. The administrative law judge denied employer's request to either reopen the record or remand the case to the district director. The administrative law judge reiterated that the miner's 1980 claim was still pending on modification, and she granted modification based on a mistake in a determination of fact. Specifically, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment by x-ray, autopsy, and medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2), (a)(4), 718.203(b), and was entitled to the rebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.305, based on proof that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found that employer did not rebut the presumption, because the record established the existence of pneumoconiosis and because employer did not prove that the miner would have been totally disabled regardless of his dust exposure in coal mine employment. The administrative law judge found the date of onset of total disability due to pneumoconiosis to be September 6, 1990, and awarded benefits as of that date.

On appeal, employer contends that the administrative law judge abused her discretion in denying its request to reopen the record. Employer further asserts that the administrative law judge erred in finding that the miner's original, 1980 claim is still pending. Additionally, employer argues that the administrative law judge erred in applying the Section 718.305 presumption and in finding that employer did not rebut the presumption. Finally, employer alleges that the administrative law judge selected the wrong onset date. Claimant responds, urging affirmance of the award of benefits but alleging that the administrative law judge erred in her onset date determination. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's procedural rulings. Employer has filed reply briefs reiterating its contentions. Insurance Company of North America (Intervenor) has filed a "Responsive Brief" adopting the briefs previously filed by employer.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge abused her discretion in refusing to reopen the record on reconsideration. This contention lacks merit. Where due process or fundamental fairness are not at issue, the decision to reopen the record is a procedural matter within the administrative law judge's discretion.[5] *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999)(*en banc*). Employer does not allege that due process or fundamental fairness require reopening the record. Employer instead argues that the administrative law judge should have reopened the record because employer's former attorney failed to submit evidence rebutting Dr. Jones's April 12, 1996 report submitted by claimant, and did not file a post-hearing brief.

Contrary to employer's position, the administrative law judge considered these arguments and did not abuse her discretion in finding that they did "not present compelling reasons for reopening this record." Decision and Order on Reconsideration at 3; *see Troup*, 22 BLR at 1-21; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). The administrative law judge reasonably determined that employer's proffered evidence, consisting of additional autopsy evidence, medical reports, and x-ray readings, was cumulative of the same sorts of items that employer had already submitted in its defense of the claim. The administrative law judge was also within her discretion to conclude that, "[t]o the extent that [the evidence] may cure any evidentiary gaps in Employer's case, the time for submission of such evidence has passed." Decision and Order on Reconsideration at 3. Additionally, upon review of the record the administrative law judge rationally found no "circumstances which would militate against holding Employer bound by the litigation decisions of its [former] counsel." *Id.*; *see Link v. Wabash*, 370 U.S. 626, 634 (1962); *Howell v. Director, OWCP*, 7 BLR 1-259, 1-262 (1984). In sum, the administrative law judge provided reasonable bases for her ruling and employer identifies no abuse of discretion in her decision not to reopen the record on reconsideration. *See Troup*, 22 BLR at 1-21; *Clark*, 12 BLR at 1-153.

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[5] Because the decision to reopen is within the administrative law judge's discretion and administrative law judges are not bound by formal procedural rules, 20 C.F.R. §725.455(b), we reject employer's argument that the administrative law judge should have applied the standard for reopening a final judgment set forth in Federal Rule of Civil Procedure 60(b).

Employer argues that the administrative law judge erred in finding that the miner's 1986 modification request was still pending so as to keep his original, 1980 claim alive. Although employer agrees that the district director' failure to hold the requested modification hearing in 1986 kept the miner's modification request pending, *see Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000), employer asserts that the miner's 1987 claim merged with and extinguished any prior pending claims when it was denied. *See* 20 C.F.R. §725.309(d) (2000).[6] Thus, employer concludes, the miner's fourth claim filed in 1990 is a duplicate claim that does not merge with any former claims.

Contrary to employer's contention, the record reflects that the district director did not merge the miner's 1987 claim with his prior, pending claims. As discussed above, when the district director denied benefits on April 22, 1987, he considered only new evidence developed with the 1987 claim and did not acknowledge the miner's prior pending filings--either the September 1980 claim or the January 1986 modification request--and simply denied benefits as if he were handling an initial claim filed on January 13, 1987. Because the district director did not merge the miner's January 13, 1987 claim with the prior pending claims, its denial did not extinguish the prior pending claims. *Cf.* 20 C.F.R. §725.309(d) (2000). The administrative law judge found that the miner's 1986 modification request of his original, 1980 claim was still pending when the miner filed his 1990 claim, requiring merger of the 1990 claim with the earlier pending claims. We agree with the Director that this was proper under the regulations. Accordingly, we affirm the administrative law judge's procedural ruling and turn to the merits of claimant's entitlement to benefits.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner 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. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in applying the Section 718.305 presumption because she did not properly determine whether the miner worked for at least fifteen years in surface conditions substantially similar to those in an underground mine. Employer argues that, at best, the administrative law judge accounted for three years of such employment, by noting the miner's testimony that he worked

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[6] Section 725.309(d)(2000) provides that where a miner files more than one claim, "the later claim for benefits shall be merged with the earlier claim for all purposes if the earlier claim is still pending." 20 C.F.R. §725.309(d)(2000).

underground for two years, and for ten months above-ground in a dusty slurry pit. Employer's contention has merit.

To be entitled to the Section 718.305 presumption of total disability due to pneumoconiosis based on fifteen years of coal mine employment, an above-ground miner must demonstrate that his or her work conditions were "substantially similar to conditions in an underground mine." 20 C.F.R. §718.305(a). A surface miner need only proffer sufficient evidence of the conditions in which he or she worked. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

In the case at bar, the administrative law judge did not make a specific finding as to the surface mining conditions established by the evidence or compare them with those known to prevail underground. The miner testified by deposition and described his work conditions as a bulldozer and crane operator pushing gob, as a hoisting engineer, and as a bulldozer and dragline operator loading slurry. Director's Exhibit 22; Miner's Deposition Tr. at 5, 7, 9, 11-13, 19, 20, 22. Rather than compare all of this testimony with known underground conditions, the administrative law judge noted the miner's testimony that while working in the slurry pit for ten months, he was exposed to a lot of dust. Decision and Order on Reconsideration at 12. She further noted his testimony that as a bulldozer operator, he moved a million tons of gob. Decision and Order on Reconsideration at 12 n.12. The administrative law judge then took official notice of provisions in the Illinois Administrative Code defining "gob" and "slurry."[7] *Id.* The administrative law judge then concluded that the miner's "work would have resulted in sufficient dust exposure to invoke the presumption." Decision and Order on Reconsideration at 12-13.

Contrary to the administrative law judge's analysis, the Seventh Circuit court requires the administrative law judge to "weigh the evidence and make a factual finding regarding substantial similarity." *Leachman*, 855 F.2d at 513. Here, the administrative law judge found that the miner's time in the slurry was very dusty, but she did not explicitly address his testimony as to the working conditions in his other surface jobs or compare those conditions to underground conditions. Since "the claimant bears the burden of establishing comparability," *Leachman*, 855 F.2d at 513, and the Board is not

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[7] Review of these definitions does not reveal a description of the dust conditions that result from working with gob or slurry. 62 Ill. Adm. Code §300.10(b)(2005). The administrative law judge did not make a specific finding as to what such conditions would be.

empowered to weigh the evidence, we must vacate the administrative law judge's finding and remand this case for her to make a specific finding as to whether the miner worked in surface conditions "substantially similar to conditions in an underground mine" for at least fifteen years. 20 C.F.R. §718.305(a); *Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Leachman*, 855 F.2d at 512.

Employer additionally argues that the administrative law judge erred in finding that the miner was totally disabled by a respiratory or pulmonary impairment. This contention lacks merit. First, as the administrative law judge found, the physicians of record, including employer's own physician, Dr. Selby, agreed that the miner was totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2)(iv); Director's Exhibits 47, 49; Claimant's Exhibit 1 at 1, 5; Employer's Exhibit 3 at 4. Second, substantial evidence supports the administrative law judge's finding that a valid, qualifying pulmonary function study administered on March 30, 1994 established that the miner had a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i). Although employer argues that it is unlikely that the March 30, 1994 pulmonary function study was valid, employer submitted no medical evidence to support its assertion. Review of the record reflects that the physician who administered the test reported that the miner understood and cooperated fully and that the results were "moderately abnormal." Director's Exhibit 47 at 2. Thus, the administrative law judge properly relied on the March 30, 1994 pulmonary function study in finding that the more recent pulmonary function study evidence established that the miner was totally disabled.[8] *See* 20 C.F.R. §718.103(a) (2000)(presuming technical compliance absent contrary evidence). Because substantial evidence supports the administrative law judge's finding, we affirm her finding pursuant to Section 718.204(b)(2).

Thus, we have affirmed the total disability element of the Section 718.305 presumption. If the administrative law judge on remand determines that claimant again establishes substantial similarity between the miner's surface conditions and those underground, the administrative law judge must determine whether, "given all the evidence, the presumption was rebutted." *Leachman*, 855 F.2d at 509. Specifically, employer validly argues that the administrative law judge did not supply a medical reason for crediting Dr. Jones's opinion that the autopsy evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (a)(4). An administrative law judge "must have a medical reason for preferring one physician's conclusion over another's." *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-318 (7th Cir.

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[8] Consequently, we need not address employer's contention that the administrative law judge improperly relied on an earlier pulmonary function study dated September 5, 1990 as additional evidence that the miner was totally disabled.

2001). Although the autopsy prosector, Dr. Katubig, and a reviewing pathologist, Dr. Crouch, concluded that examination of the miner's autopsy lung tissue did not reveal pneumoconiosis, the administrative law judge chose to credit reviewing pathologist Dr. Jones's diagnosis of pneumoconiosis because he had reviewed the reports of Drs. Selby and Kahn. Decision and Order on Reconsideration at 11. In so doing, the administrative law judge did not explain how Dr. Jones's review of these additional medical reports enhanced his ability to determine whether pneumoconiosis was present in the miner's lung tissue. Thus, she did not identify a medical reason for preferring Dr. Jones's opinion over those of the other two pathologists. *See McCandless*, 255 F.3d at 469, 22 BLR at 2-318.

Consequently, we must vacate the administrative law judge's finding and instruct her to reweigh the medical evidence consistent with *McCandless*. On remand, the administrative law judge should take into account that, as employer notes, Dr. Jones inaccurately stated that the other two pathologists indicated that pneumoconiosis was present. Claimant's Exhibit 1 at 1. Because the administrative law judge must consider whether "given all the evidence," the Section 718.305 presumption has been rebutted," *Leachman*, 855 F.2d at 509, and because autopsy evidence is recognized as highly reliable evidence as to the existence of pneumoconiosis, *see Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 334, 22 BLR 2-581, 2-587 (7th Cir. 2002); *Terlip v. Director, OWCP*, 7 BLR 1-363, 1-364 (1985), we instruct the administrative law judge to reconsider whether all of the relevant evidence establishes either that the miner "did not have pneumoconiosis, or that his . . . respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 20 C.F.R. §718.305(a).

If, on remand, the administrative law judge finds that claimant has not established invocation of the Section 718.305 presumption, the administrative law judge must determine whether claimant has demonstrated that the miner had pneumoconiosis arising out of coal mine employment and that his total disability was due to pneumoconiosis. If the administrative law judge finds entitlement established on remand, she should also reconsider the onset date of total disability due to pneumoconiosis pursuant to Section 725.503(b),(d).[9]

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[9] If the administrative law judge again considers the September 5, 1990 pulmonary function study relevant to determining the onset date of the miner's total disability due to pneumoconiosis, she should address employer's contention that the test is not qualifying because the miner's height of 69" falls between the heights of 68.9" and 69.3" listed in the Table at 20 C.F.R. Appendix B. On appeal, the Director has not responded to employer's argument concerning this issue. One circuit court has noted the Department of Labor's position of using the closest greater height when a miner's height falls

Accordingly, the administrative law judge's Decision and Order on Reconsideration - Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

between two listed heights. *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84-85 n.6 (4th Cir. 1995). If necessary on remand, the administrative law judge could seek the Director's view on this issue.