

BRB No. 05-0189 BLA

JO ANNE HIXON)	
(Widow of RICHARD HIXON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ZEIGLER COAL COMPANY)	
)	
Employer-Respondent)	DATE ISSUED: 07/22/2005
)	
INSURANCE COMPANY OF NORTH)	
AMERICA)	
)	
Intervener)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Mark E. Solomons (Greenberg Traurig, LLP), Washington, D.C., for employer.¹

Philip L. Robertson (Manier & Herod), Nashville, Tennessee, for intervener.

¹ Subsequent to the filing of claimant's notice of appeal, employer's counsel withdrew from the case.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (2000-BLA-376) of Administrative Law Judge Rudolf L. Jansen denying benefits with respect to claims filed by the miner and the survivor 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 has previously been before the Board.

Pursuant to the prior appeal, the Board affirmed, as unchallenged, the administrative law judge's length of coal mine employment³ determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203 and 718.204(b)(2)(i)-(ii). *Hixon v. Zeigler Coal Co.*, BRB No. 02-0888 BLA (Sept. 25, 2003)(unpub.), slip op. at 2 n.3. The Board vacated, however, the administrative law judge's total disability findings at 20 C.F.R. §718.204(b)(2)(iii) and (iv), because the administrative law judge's consideration of the evidence relevant thereto did not comply with the requirements of 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). *Hixon*, slip

² Claimant is Jo Anne Hixon, the miner's widow. The miner, Richard Hixon, filed his initial claim for benefits on January 26, 1988, which was finally denied on April 26, 1988. Director's Exhibit 24. The miner filed a second claim on October 20, 1994, which was denied on March 21, 1997. Director's Exhibits 1, 21, 27. The miner subsequently filed a request for modification, which was finally denied on December 11, 1997. Director's Exhibits 28, 29, 33. The miner died on September 20, 1997 and claimant made a second request for modification in the miner's claim in October, 1998 and also filed a survivor's claim on August 14, 1998. The request for modification and the survivor's claim were denied on December 14, 1999. Director's Exhibits 37, 38, 63. Claimant subsequently requested a hearing on both claims. Director's Exhibits 65, 66.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's qualifying coal mine employment occurred in Illinois. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

op. at 4; *see Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). The Board instructed the administrative law judge that, on remand, he must make a finding as to the probative weight to which the individual medical opinions are entitled by examining the explanations supporting their opinions, the documentation underlying their opinions, and the bases of their diagnoses. Additionally, the Board instructed the administrative law judge to resolve the conflicts between the medical opinions, and to set forth the rationale underlying his findings. *Hixon*, slip op. at 4.

The Board further held that, with respect to the issue of disability causation at Section 718.204(c), the administrative law judge did not properly apply the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). *Hixon*, slip op. at 4-5. In *Vigna*, the court held that if a miner would have been disabled at the same time and to the same extent by conditions other than pneumoconiosis, he was not entitled to benefits under the Act. Thus, the Board vacated the administrative law judge's findings relevant to 20 C.F.R. §718.204(c) and instructed the administrative law judge, on remand, to reconsider his finding regarding the cause of the miner's disability in light of the holding in *Vigna*. *Hixon*, slip op. at 4-5.

With respect to the survivor's claim, the Board initially declined to address claimant's arguments concerning the administrative law judge's findings under Section 718.202(a)(1), as the administrative law judge found the existence of pneumoconiosis established under Section 718.202(a)(2). *Hixon*, slip op. at 5. The Board vacated, however, the administrative law judge's finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c) as it did not conform with the APA. *Hixon*, slip op. at 5; *see Wojtowicz*, 12 BLR 1-162; *Hall*, 12 BLR 1-80. The Board instructed the administrative law judge, on remand, to make a finding as to the probative weight to which the individual medical opinions are entitled by examining the explanations of their opinions, the documentation underlying their opinions, and the bases of their diagnoses. The Board also instructed the administrative law judge to resolve the conflicts between the medical opinions, and to set forth the rationale underlying his findings. *Hixon*, slip op. at 5.

On remand, the administrative law judge again found the evidence of record insufficient to establish total disability due to pneumoconiosis or death due to pneumoconiosis pursuant to 20 C.F.R. §§718.204, 718.205. Accordingly, he denied benefits on both the miner's and the survivor's claims.

On appeal, claimant contends that the administrative law judge again erred in failing to find total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)

and (c), and in failing to find that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. 718.205. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's procedural rulings, which were previously addressed by the Board in its Order dated April 22, 2005. Employer's counsel withdrew prior to filing a brief. Insurance Company of North America (Intervener) has filed a brief urging affirmance of the administrative law judge's denial of benefits.

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

Claimant asserts that in finding the evidence of record insufficient to establish total disability due to pneumoconiosis or death due to pneumoconiosis pursuant to 20 C.F.R. §§718.204, 718.205, the administrative law judge repeated his prior errors by: failing to provide an adequate explanation for his findings; failing to properly analyze the opinions of Drs. Repsher, Caffrey, Naeye, Kleinerman, Renn, and Tuteur, and instead merely reciting their conclusions; omitting any discussion of the causation opinions offered by Drs. Patel, Cohen, Jones and Green; and failing to "address the merits of the miner's claim." Claimant's Brief at 11-12, 14. We disagree.

Contrary to claimant's arguments, in addition to explicitly incorporating the discussion of the medical opinions set forth in his prior decision, the administrative law judge discussed the merits of all of the relevant medical opinions of record and found the evidence insufficient to establish that pneumoconiosis contributed to the miner's disability or death. The administrative law judge then specifically stated that he accorded greater weight to the opinions of Drs. Repsher, Naeye, Kleinerman, Renn, Caffrey and Tuteur, who opined that the miner's mild pneumoconiosis did not contribute to his disability or hasten his death, because they provided more detailed, more comprehensive and better documented and reasoned opinions than Drs. Jones, Green and Cohen, who opined that claimant's total disability and death were due, in significant part, to pneumoconiosis.⁴ Claimant's Exhibits 1, 2; Director's Exhibits 31, 29, 53, 59; Employer's Exhibits 2-6; Decision and Order at 6-7, 9. In doing so, the administrative law judge noted that Drs. Repsher, Naeye, Kleinerman, Renn, Caffrey and Tuteur fairly considered the miner's twenty-six pack year smoking history, and his history of strokes

⁴ We note that Drs. Jones and Green do not appear to have offered any opinion as to the cause of the miner's disability. They only addressed the cause of his death. Claimant's Exhibit 1; Director's Exhibits 31, 39.

and severe heart conditions, while Drs. Jones, Cohen and Green focused on the miner's mild pneumoconiosis and respiratory conditions without providing similarly detailed and comprehensive explanations of how the miner's more serious health conditions and the overall picture of his health interacted to lead to his disability and eventual death. Decision and Order at 6-7, 9.

An administrative law judge may legitimately assign less weight to a medical opinion which presents an incomplete picture of the miner's health, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and may also accord greater weight to those opinions he finds better explained, reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub). Thus, we affirm the administrative law judge's finding that the medical opinions are insufficient to establish that the miner's pneumoconiosis contributed to either his disability or death pursuant to Sections 718.204(c), 718.205(c).

Claimant also asserts, with respect to disability causation, that the administrative law judge erred in applying *Vigna*, which claimant asserts was overruled by *Midland Coal Co. v. Director [Shores]*, 358 F.3d 486 (7th Cir. 2004) subsequent to the Board's remand in this case. Contrary to claimant's arguments, the Seventh Circuit subsequently held in *Gulley v. Director, OWCP*, F.3d , 2005 WL 287981 (7th Cir. 2005), that pursuant to *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 864-65, 23 BLR 2-124, 1-164-165 (D.C. Cir. 2002), *Vigna* is still applicable to claims such as this one, filed prior to January 19, 2001. However, as we have affirmed the administrative law judge's finding that the medical evidence of record is insufficient to establish that pneumoconiosis was a contributing cause of the miner's disability, we need not address claimant's remaining contention that the administrative law judge improperly determined that the miner would have been disabled at the same time and to the same extent by conditions other than pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Based on our foregoing discussion, we affirm the administrative law judge's findings that the medical evidence of record is insufficient to establish that the miner's pneumoconiosis contributed to either his disability or death pursuant to Sections 718.204(c), 718.205(c). Consequently, we affirm the administrative law judge's denial of benefits in both the miner's and the survivor's claims.⁵

⁵ We note claimant's request, with respect to the survivor's claim, that the Board reconsider her argument in the prior appeal that the administrative law judge erred when he concluded that the x-ray evidence did not establish the existence of pneumoconiosis. Claimant's Brief at 14. We again decline to address claimant's arguments under Section 718.202(a)(1), as the administrative law judge found pneumoconiosis established under

Because we affirm herein the administrative law judge's denial of benefits in the miner's claim, based on the insufficiency of the record evidence to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), we do not address claimant's challenge to the administrative law judge's finding that the evidence failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). A finding of entitlement to benefits is precluded in this case.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits in both the miner's and the 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

Section 718.202(a)(2). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988);
Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).