BRB No. 99-0968 BLA

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| ALMA MARSHALL<br>(Widow of GEORGE MARSHALL)<br><br>Claimant-Respondent<br><br>v.<br><br>PINEY CREEK COAL COMPANY<br><br>Employer-Petitioner<br>and<br><br>KESSLER COAL COMPANY and<br>WEST VIRGINIA COAL WORKERS'<br>PNEUMOCONIOSIS FUND<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS, UNITED<br>STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits on Living Miner's Claim and Remanding Widow's Claim to the District Director of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Alma Marshall, Beckley, West Virginia, *pro se*.

John P. Scherer (File, Payne, Scherer & File), Beckley, West Virginia, for Piney Creek Coal Company.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Piney Creek Coal Company (employer) appeals the Decision and Order Awarding Benefits on Living Miner's Claim and Remanding Widow's Claim to the District Director (97-BLA-1392) of Administrative Law Judge Daniel F. Sutton on claims 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). This case involves a living miner's claim filed on January 2, 1991,[1] and a survivor's claim filed on July 22, 1991.[2] In his Decision and Order, the administrative law judge first found that claimant had never been afforded sixty days in which to appeal the district director's September 11, 1991 denial of the survivor's claim as required under 20 C.F.R. §725.410(c), and that the record did not support the district director's "unexplained administrative fiat" in March 1996 that the survivor's claim had been closed by reason of abandonment.[3] *See* Decision and Order at 7. The administrative law

[1]Although the record does not contain a previously submitted miner's claim, the district director's Notice of Initial Determination of entitlement to benefits, which is dated June 28, 1991, reflects that the January 2, 1991 claim is a duplicate claim inasmuch as the district director refers in that document to a previous January 1, 1983 denial of benefits. *See* Director's Exhibit 18. The administrative law judge did not discuss the instant January 2, 1991 miner's claim in the context of a duplicate claim analysis pursuant to 20 C.F.R. §725.309, but rather considered the 1991 claim on the merits. Inasmuch as the parties do not contest the administrative law judge's consideration of the claim on the merits without first addressing specifically the issue of a material change in conditions under Section 725.309, we decline to disturb it. *See generally Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2]The miner died on July 2, 1991, while the miner's claim was pending. Director's Exhibit 24. Claimant, the miner's widow, filed a survivor's claim on July 22, 1991. *Id*.

[3]The district director denied the survivor's claim on September 11, 1991, informing claimant that she had sixty days within which to file additional evidence or request a hearing. Director's Exhibit 24. In a letter dated September 20, 1991, the district director informed claimant that she would not be receiving interim benefits from the Black Lung Disability Trust Fund because her husband (the miner) was deceased. *Id*. In that letter, the district director also requested claimant to notify the district director's office within *twenty* days whether she wished a hearing on her survivor's claim so that it might be consolidated with the pending miner's claim. *Id*. Having evidently not received correspondence from claimant within that time frame, the district director referred both the survivor's claim and the miner's claim to the Office of Administrative Law Judges (OALJ) on October 25, 1991. Director's Exhibit 25. In an Order of Remand dated June 10, 1992, Administrative Law Judge Michael P. Lesniak determined that there was insufficient evidence before him to render a finding on the issue of whether Mr. Marshall, as a vice-president and manager with Piney Creek Coal Company (Piney Creek), was performing the work of a "miner" within the meaning of the Act while in Piney Creek's employ. Judge Lesniak thus remanded the case to the district director for further evidentiary development on the responsible operator issue, without reaching the merits of the case. Director's Exhibit 36. In a Proposed Decision and Order dated September 9, 1992, the district director determined that, in light of affidavits submitted by claimant, Mr. Marshall was a "miner" within the meaning of the Act and that, therefore, Piney Creek was still

the primary responsible operator. Director's Exhibit 48. The district director, however, named Kessler Coal Company as a back-up, putative responsible operator. *Id*. By letter dated September 10, 1992, Piney Creek requested a hearing before the OALJ. The record reflects that the district director did not refer the case to the OALJ and, apparently, did not otherwise take action pursuant to that request. Director's Exhibit 46.

In a February 21, 1996 telephone conference and by letter dated February 22, 1996, employer asked the district director to update the status of this case, and requested an informal conference. Director's Exhibits 49, 50. In a letter to employer dated March 8, 1996, the district director requested that employer agree to pay benefits, stating that "[s]ince Mrs. Marshall's application is administratively closed as she did not appeal the [September 11, 1991 denial][,] the only active claim is that of Mr. Marshall." Director's Exhibit 52. The record reflects that, prior to this time, the district director had not made a determination that claimant's survivor's claim was closed. Subsequently, in a Memorandum of Informal Conference dated April 24, 1997, the district director reiterated his findings from the 1992 Proposed Decision and Order with regard to the responsible operator issue, stated that the survivor's claim had been administratively closed, without reference to any previous administrative determination, and determined that claimant was entitled to benefits in the living miner's claim. Director's Exhibit 55. The district director then forwarded the case to the OALJ on June 10, 1997, Director's Exhibits 59, 60, and the case was ultimately assigned to Administrative Law Judge Daniel F. Sutton (the administrative law judge), who issued his Decision and Order on the record pursuant to the agreement of the parties.

judge thus found that the district director's determination in March 1996 violated claimant's right to due process. Finding that it would be "wholly inappropriate to adjudicate the survivor's claim on the present record," the administrative law judge remanded the survivor's claim to the district director with instructions to provide claimant with the full sixty day notice specified under Section 725.410(c) within which to appeal the district director's September 11, 1991 denial of the survivor's claim by either submitting new evidence or requesting a hearing. The administrative law judge then determined that Piney Creek Coal Company is the responsible operator and credited the miner with thirty-three years and eight months of coal mine employment.

Proceeding to consider the miner's claim on the merits, the administrative law judge found that, although claimant failed to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), the medical opinion evidence of record was sufficient to establish under 20 C.F.R. §718.202(a)(4) that the miner had the disease. The administrative law judge further determined that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and that the presumption was not rebutted. The administrative law judge then found the pulmonary function study, arterial blood gas study and medical opinion evidence of record sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c), and that claimant established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. On appeal, Piney Creek Coal Company challenges the administrative law judge's responsible operator finding and findings under Sections 718.202(a)(4) and 718.204(b). Kessler Coal Company has not filed a notice of appeal or response brief. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging the Board to affirm the administrative law judge's responsible operator finding.[4]

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

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings under 20 C.F.R. §§ 718.203(b) and 718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11-13, 17-18. Additionally, we affirm the administrative law judge's decision to remand the survivor's claim to the district director for further evidentiary development inasmuch as employer does not challenge the administrative law judge's decision to do so, but only contends generally that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See Skrack, supra*; Decision and Order at 6-7.

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).

On appeal, employer first challenges the administrative law judge's finding that it is the responsible operator liable for the payment of benefits, contending that the administrative law judge erred in finding that the miner's employment with it as a vice-president constituted the work of a miner within the meaning of the Act. Employer contends that there is no evidence that the miner shoveled coal, loaded supplies, or crawled in low coal, as noted by Dr. Rasmussen in the doctor's January 25, 1991 examination report. Employer's contention lacks merit. The issue of whether a claimant is a "miner" is a factual finding to be made by the administrative law judge. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). The administrative law judge correctly stated that, in addition to Dr. Rasmussen's notation of the miner's duties, Director's Exhibits 8, 9, several of employer's workers stated in affidavits on behalf of claimant that they saw the miner underground in the mines, and that the miner was exposed to coal dust there. Decision and Order at 9-10; Director's Exhibit 43. The administrative law judge noted that one of the affiants, Darl B. Sarrett, stated that he worked with the miner and saw him go underground "on a regular basis inspecting working conditions, taking dust samples....[and accompanying underground] mine inspectors – State and Federal...." Decision and Order at 9; Director's Exhibit 43. The administrative law judge correctly noted that Mr. Sarrett also indicated that the miner helped repair equipment. *Id*. The administrative law judge properly found that these activities are "functions integrally related to the extraction or preparation of coal so as to qualify an employee as a miner for purposes of the Act." Decision and Order at 10; *see e.g., Tobin v. Director, OWCP*, 8 BLR 1-115 (1985); *Canonico v. Director, OWCP*, 7 BLR 1-547 (1984); *Luther v. Director, OWCP*, 7 BLR 1-279 (1984). The administrative law judge also correctly stated that employer did not submit depositions or statements from miners or company officers to contradict claimant's affiants' statements, aside from submitting into the record a state workers' compensation form prepared by employer on which a box was check-marked indicating that the miner was "never exposed to minute particles of dust for a continuous period of not less than sixty days." Decision and Order at 9-10; Director's Exhibit 41. We affirm, therefore, the administrative law judge's finding that, contrary to employer's contention, the miner's work for employer satisfied the function test requirement for meeting the Act's definition of a miner. 30 U.S.C. §902(d); 20 C.F.R. §725.101(a)(26); *see Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985). Inasmuch as employer does not otherwise challenge the administrative law judge's responsible operator determination, the administrative law judge's finding that employer is the responsible operator liable for the payment of any benefits is affirmed.

With regard to the merits of the instant miner's claim, employer contends that the administrative law judge erred in crediting Dr. Rasmussen's medical opinion over Dr. Hansbarger's medical opinion in finding the evidence sufficient to establish that the miner suffered from pneumoconiosis and that the miner's total disability was due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(b), respectively. Contrary to employer's contention, the administrative law judge properly credited Dr. Rasmussen's opinion that the miner suffered from pneumoconiosis as better reasoned and documented than Dr. Hansbarger's opinion. *See 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*);

1996 Decision and Order at 16-17; Director's Exhibits 8, 9, 29, 32. Employer is incorrect in asserting that Dr. Rasmussen ignored the miner's extensive cigarette smoking history and evidence of arteriosclerotic heart disease. In the report of his examination of the miner on January 25, 1991, Dr. Rasmussen noted that the miner smoked three-quarters of a pack of cigarettes per day for thirty-two years. Director's Exhibits 8, 9. Dr. Rasmussen further diagnosed the miner with arteriosclerotic heart disease, noting that the miner suffered a myocardial infarction in 1970. *Id*. The administrative law judge properly stated that Dr. Rasmussen made his diagnosis of pneumoconiosis after considering the miner's histories, clinical findings on examination, and results of objective testing, which included an x-ray, pulmonary function study and arterial blood gas study. Decision and Order at 16; Director's Exhibits 8, 9. The administrative law judge further correctly stated that Dr. Hansbarger, who did not examine the miner but reviewed much of the medical evidence of record, evidently did not review the positive x-ray interpretations of Drs. Speiden and Francke, since he indicated that all of the x-ray interpretations were negative for pneumoconiosis, and did not address the fact that the miner's treating physician, Dr. Subbaraya, consistently diagnosed pneumoconiosis in his numerous hospitalization reports during an approximate ten year period. Decision and Order at 16; Director's Exhibit 29. The administrative law judge's determination that Dr. Rasmussen's opinion was well-reasoned and documented and entitled to greater weight than Dr. Hansbarger's report is thus supported by substantial evidence and is in accordance with law. *See Clark, supra; Tackett, supra*; Decision and Order at 16-17. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence was sufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Subsequent to the administrative law judge's Decision and Order and employer's appeal, however, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, held in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, __ BLR __ (4th Cir. 2000), that although Section 718.202(a) enumerates four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The Board will apply the law in effect at the time of its decision. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Hill v. Director, OWCP*, 9 BLR 1-126 (1986). Because the administrative law judge previously was not required to weigh all of the evidence together under Section 718.202(a)(1)-(4), but is now required to do so pursuant to *Compton*, we remand this case for the administrative law judge to weigh all of the evidence together under Section 718.202(a)(1)-(4); *i.e.*, to make a finding with regard to whether the miner suffered from pneumoconiosis consistent with the Fourth Circuit's recent decision. *See Compton, supra*.

We agree with employer's next contention that the administrative law judge improperly rejected Dr. Hansbarger's opinion that the miner's total disability was not due to pneumoconiosis under Section 718.204(b). The administrative law judge rejected Dr. Hansbarger's opinion on disability causation solely because Dr. Hansbarger concluded that the miner did not have pneumoconiosis, a conclusion at odds with the administrative law judge's finding that the miner had the disease. Decision and Order at 18. This reasoning violates the holding of the United States Court of Appeals for the Fourth Circuit in *DeHue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304, (4th Cir. 1995). In *Ballard*, the court held that, even though an administrative law judge has found

that a miner suffers from pneumoconiosis, a physician's disability causation opinion which is premised upon an understanding that the miner does not have pneumoconiosis may still have probative value when the opinion acknowledges the miner's pulmonary or respiratory impairment, as does Dr. Hansbarger's opinion in the instant case. *See Ballard, supra;* Director's Exhibits 29, 32. The court explained that such an opinion is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Id*. We vacate, therefore, the administrative law judge's finding under Section 718.204(b), and remand the case for the administrative law judge to reconsider, if reached, the relative merits of the opinions of Drs. Rasmussen and Hansbarger thereunder in light of *Ballard*. *See Ballard, supra*; *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 790, 19 BLR 2-86 (4th Cir. 1995); *but see Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Living Miner's Claim and Remanding Widow's Claim to the District Director is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge