BRB No. 01-0768 BLA

TILDA MAE THACKER (Widow of TILDEN THACKER) Claimant-Respondent v. KENTLAND ELKHORN COAL COMPANY and EMPLOYERS SERVICE CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Mary Forrest-Doyle (Eugene Scalia, 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:

Employer appeals the Decision and Order (00-BLA-0853) of Administrative Law Judge Joseph E. Kane awarding benefits 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).[1] The instant case involves a survivor's claim filed on April 15, 1996.[2] In the initial decision, Administrative Law Judge Pamela Lakes Wood, after noting that the parties stipulated that the miner was engaged in coal mine employment for at least twenty years, found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). Judge Wood also found that claimant[3] was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine

[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The miner filed a claim on September 16, 1979. Director's Exhibit 32. In a Decision and Order dated June 7, 1983, Administrative Law Judge Julius A. Johnson denied benefits. *Id.* There is no indication that the miner took any further action in regard to his 1979 claim.

[3]Claimant is the surviving spouse of the deceased miner who died on March 3, 1996. Director's Exhibit 7.

employment pursuant to 20 C.F.R. §718.203(b) (2000). Judge Wood, however, found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, Judge Wood denied benefits.

Claimant subsequently requested modification of her denied claim. Administrative Law Judge Joseph E. Kane (the administrative law judge) found no error in the previous determination that the miner suffered from pneumoconiosis which arose out of his coal mine employment. The administrative law judge, however, found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

In a Motion to Remand dated October 18, 2001, employer requested that the Board remand the instant case to the district director for the development of additional evidence. In support of its motion, employer asserted, *inter alia*, that if the new regulations were to be applied retroactively to the present claim, employer was entitled to develop evidence pursuant to the new regulations. By Order dated February 14, 2002, the Board granted employer the opportunity to file a supplemental brief in support of its Motion to Remand. *Thacker v. Kentland Elkhorn Coal Corp.*, BRB No. 01-0768 BLA (Feb. 14, 2002) (Order) (unpublished). The Board instructed employer to "identify specifically the regulation(s) it allege(d) [were] being retroactively applied." *Id.* The Board also instructed employer to address the administrative law judge's determination that the new regulations "do not change the law in this circuit as concerns this case."[4] *Id.*

Employer filed a supplemental brief, arguing that because the Department of Labor (the Department) issued new black lung regulations after the development of the evidence and the hearing took place, the instant case should be remanded to the district director for the development of additional evidence. Employer contends that the Department "promulgated new rules that redefined pneumoconiosis to specify that it is both latent and progressive." Claimant has filed a supplemental brief, requesting that the Board deny employer's Motion to Remand. The Director has

[4]On March 7, 2002, employer filed a motion requesting an extension of time in which to file a supplemental brief in support of its motion to remand. Noting that there were no objections to employer's motion, the Board, by Order dated March 21, 2002, held that employer could file a supplemental brief in support of its motion to remand within ten days from receipt of the Board's Order. *Thacker v. Kentland Elkhorn Coal Corp.*, BRB No. 01-0768 BLA (Mar. 21, 2002) (Order) (unpublished).

filed a supplemental brief, contending that revised Section 718.201(c) reflects the pre-existing statutory and regulatory scheme and is fully consistent with prior case law. The Director, therefore, asserts that the application of revised Section 718.201(c) is not impermissibly retroactive and does not violate employer's due process rights.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 requests that the case be remanded for the development of additional evidence inasmuch as the Department has promulgated new rules that redefined pneumoconiosis to specify that it is both latent and progressive. Revised Section 718.201(c) recognizes pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). In the instant case, the administrative law judge found that revised Section 718.201(c) codifies existing law regarding the latency and progressivity of pneumoconiosis. Decision and Order at 2.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has specifically recognized, on numerous occasions, the progressive nature of pneumoconiosis. *See Crace v. Kentland-Elkhorn Coal* Corp., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997) (recognizing that more recent evidence is often accorded more weight "because of the progressive nature of pneumoconiosis"); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (recognizing progressive nature of black lung disease); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993) (Pneumoconiosis is a progressive and degenerative disease)*; Saginaw Mining Co. v. Ferda*, 879 F.2d 198 (6th Cir. 1989) (recognizing that the rationale in affording the greatest weight to the latest evidence is based upon the accepted medical belief that pneumoconiosis is a progressive disease). The U.S. Supreme Court has also recognized the progressive nature of pneumoconiosis. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) (recognizing that pneumoconiosis is a "serious and progressive pulmonary condition").

Employer, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974), contends that the Department may not proceed to set forth a new principle by both adjudication and rulemaking. Employer's Supplemental Brief in Support of Motion to Remand at 3. Employer contends that "[h]aving chosen to subject progressivity and latency to rulemaking, the rule must rise or fall on the record created there." *Id.* Employer's reliance

upon *Bell Aerospace* is misplaced. In *Bell Aerospace*,[5] new principles of law were introduced in the adjudicatory proceeding. In the instant case, the Department's regulation at Section 718.201 codifies pre-existing Sixth Circuit case law setting forth the principle that pneumoconiosis is a latent and progressive disease. Decision and Order at 2.

Because revised Section 718.201(c) reflects the pre-existing statutory and regulatory scheme and is fully consistent with prior case law acknowledging the principle that pneumoconiosis is a progressive, latent disease, we deny employer's request to remand the case for further development of the evidence.

We now turn our attention to employer's contention that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[6] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v.*

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[5]In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the National Labor Relations Board (NLRB), on a petition by a labor union for a representation election, held that the buyers employed by Bell Aerospace Company (Bell Aerospace) constituted an appropriate collective-bargaining unit and directed an election. The NLRB stated that even though the buyers might be "managerial employees," they were nevertheless covered by the NLRB in the absence of any showing that union organization of the buyers would create a conflict of interest in labor relations. The buyers subsequently voted for the union and the NLRB certified it as their exclusive bargaining representative. Bell Aerospace refused to bargain, however, and was found guilty of an unfair labor practice and ordered to bargain. The United States Court of Appeals for the Second Circuit denied enforcement because it held, *inter alia*, that the NLRB, in view of its previous contrary decisions, was required to proceed by rulemaking rather than by adjudication in determining whether buyers were "managerial employees." The United States Supreme Court, however, held that the NLRB was not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication rested in the first instance within the NLRB's discretion. *Bell Aerospace*, 416 U.S. at 294.

[6]Section 718.205(c) provides that:

> (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.

Director, OWCP, 11 BLR 1-85 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

Employer argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c). Employer argues that the well reasoned and documented opinions by the highest qualified physicians support a finding that the miner's death was not due to pneumoconiosis.[7] Employer's brief, however, neither raises any substantive issues nor identifies any specific error on the part of the administrative law judge in determining that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis.[8] We, therefore, affirm the administrative law judge's finding

[7]In finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge credited the opinions of Drs. Gibson, Koenig, Green and Abraham. Decision and Order at 24. The administrative law judge, after noting Dr. Gibson's status as the miner's treating physician, accurately noted that the "other physicians all hold impressive credentials in their fields of pathology and pulmonology." Decision and Order at 23. While Dr. Koenig is Board-certified in Internal Medicine and Pulmonary Disease, Director's Exhibit 56, Drs. Green and Abraham are each Board-certified in Anatomic Pathology. Director's Exhibit 52; Claimant's Exhibit 1.

[8]In challenging an administrative law judge's decision on appeal, a party must do more than recite evidence favorable to its case. An employer must demonstrate with some degree of specificity the manner in which substantial evidence precludes an award of benefits or explain why the administrative law judge's decision is contrary to law. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR

that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c); *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

1-119 (1987). A general contention that the evidence precludes an award of benefits, without raising specific contentions of error by the administrative law judge, is equivalent to a request to reweigh the evidence of record, a request beyond the Board's scope of review. *Koch v. Director, OWCP*, 6 BLR 1-909 (1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge