BRB No. 99-0623 BLA

TONA MOORE ROSE)
(Widow of BERT ROSE))
)
Claimant-Petitioner)
)
v.)
)
ELKINS ENERGY CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
Employer/Carrier-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Upon Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura & Quinn & Walls, LLP), Birmingham, Alabama, for claimant.

Richard Davis (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Upon Remand (84-BLA-04385) of Administrative Law Judge Robert D. Kaplan denying benefits on claims[1] 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). This case is before the Board for the sixth time.[2] In the most recent prior appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to specifically address the evidence pursuant to the proper standard and determine if employer successfully established rebuttal of the presumption contained in 20 C.F.R. §718.305. *See Rose v. Elkins Energy Corp.*, BRB No. 97-1646 BLA (Aug. 24, 1998)(unpub.). On remand, the administrative law judge concluded that based upon the opinion of Dr. Dahhan, rebuttal of the Section 718.305 presumption was established. *See* Decision and Order Upon Remand at 3-5. Accordingly, benefits were denied in both the miner's and survivor's claims. On appeal, claimant contends that the administrative law judge erred in failing to discuss the other regulatory criteria at 20 C.F.R. Part 718, in not discussing whether complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304, in failing to give greater weight to Dr. Buddington's opinion and in failing to find death due to pneumoconiosis. Employer responds urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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[1]Claimant is Tona Moore Rose, the miner's widow. The miner, Bert Rose, filed a claim for benefits on February 26, 1981. Director's Exhibit 1. The miner died on August 1, 1981, and claimant filed a survivor's claim on October 14, 1981. Director's Exhibits 2, 6.

[2]The procedural history of this case has previously been set forth in detail in the Board's prior decisions in *Rose v. Elkins Energy Corp.*, BRB No. 97-1646 BLA (Aug. 24, 1998)(unpub.) and *Rose v. Elkins Energy Corp.*, BRB No. 96-0260 BLA (Nov. 26, 1996)(Dolder, J., dissenting)(unpub.), which are incorporated herein by reference.

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 into the Act 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 the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed before January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was significantly related to the cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit has held that claimant may meet her burden of proof where pneumoconiosis actually hastens the miner's death.[3] *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order Upon Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Initially, claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (A PA), 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), is without merit.[4] The administrative law judge fully discussed the relevant

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[4]The Administrative Procedure Act requires each adjudicatory decision to include a

evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

Claimant further contends that the administrative law judge erred in according greater weight to the opinion of Dr. Dahhan, who stated that the miner's pneumoconiosis had not resulted in respiratory symptoms or disability and that there was no cause and effect relationship between coal mine employment and the miner's terminal bronchogenic carcinoma. Claimant asserts that the opinion of Dr. Buddington, that coal workers' pneumoconiosis might have contributed to the miner's death to some degree "should have been given more weight." Claimant's Brief at 13. Claimant's Brief at 12-14; Claimant's Exhibit 3; Employer's Exhibit 4. We disagree. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp Coal Co.*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge considered the relevant evidence of record and permissibly credited the opinion of Dr. Dahhan as it was well documented and reasoned. 1987 Decision and Order at 9 on remand and dated July 21, 1997. Fields, 10 BLR 1-19 (1987). In addition, the administrative law judge determined in his 1997 Decision and Order that Dr. Buddington's opinion was equivocal in nature and entitled to little weight. *Id.* Inasmuch as the administrative law judge's findings are the supported by substantial evidence, we affirm the administrative law judge's reliance on Dr. Dahhan's opinion and his finding that this opinion is sufficient to establish rebuttal of the Section 718.305 presumption. *Bethlehem Mines Corp. , v. Massey* 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). *See also Grigg v. Director, OWCP,* 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).
Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988); *Campbell v. Director, OWCP ,* 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.,* 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.,* 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.,* 6 BLR 1-1157 (1984).

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statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 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).

Claimant also contends that the administrative law judge erred in failing to determine if complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304. Although the administrative law judge did not specifically discuss the applicability of Section 718.304, a remand is not required as the irrebuttable presumption is not available in the instant case. There is no x-ray evidence of record indicating an opacity greater than one centimeter in diameter. In addition, the conclusions by Dr. Harrison that the biopsy showed "1 to 2.5 centimeter masses" and Dr. Buddington that the biopsy slides indicated "severe" or "advanced" pneumoconiosis, without equating these findings with the size of x-ray opacities, are insufficient to trigger the presumption. *See* 20 C.F.R. §718.304(a); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 21 BLR 2- (4th Cir. 1999); *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); Claimant's Exhibits 4-7, 9; Employer's Exhibits 10-15; Director's Exhibit 8. Additionally, no physician characterized the autopsy or biopsy as revealing "massive lesions" and there is no other evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §718.304(b), (c); Employer's Exhibits 1-4, 6, 10-15; Claimant's Exhibits 1, 3-7, 9; Director's Exhibits 6-8, 12, 15. Inasmuch as the medical evidence of record is insufficient to establish entitlement to the presumption at Section 718.304 we reject claimant's contention. *See* 20 C.F.R. §718.304; *Blankenship, supra*; *Gray, supra*; *Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985); *Lohr, supra*.

Finally, claimant contends that the administrative law judge failed to review the evidence of record under the other 20 C.F.R. Part 718 criteria. This contention lacks merit. The administrative law judge, in his prior decision, found that claimant established the existence of pneumoconiosis arising out of coal mine employment and that the miner was totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §§718.202(a)(1), (2), 718.203, 718.204(c); Decision and Order on Remand dated July 21, 1997 at 7-8. These findings have been affirmed by the Board. *See Rose v. Elkins Energy Corp.*, BRB No. 97-1646 BLA (Aug. 24, 1998)(unpub.). The administrative law judge further concluded that the total disability was not due to pneumoconiosis pursuant to 20 C.F.R.§718.204(b) based on the opinions of Drs. Dahhan, Caffrey and Stewart, and also relied on these opinions to establish rebuttal of the Section 718.305 presumption. Decision and Order on Remand at 10-11. The Board vacated the administrative law judge's reliance on these opinions and remanded the case for further consideration. *See Rose, supra*. As the administrative law judge, on remand, permissibly relied upon the opinion of Dr. Dahhan, who concluded that the miner's pneumoconiosis did not result in disability, entitlement under the criteria of Part 718 is precluded.[5] *See*

[5]Additionally, with respect to the survivor's claim, the only evidence supportive of claimant's burden to establish death due to pneumoconiosis, Dr. Buddington's opinion, was

Hobbs v. Clinchfield Coal Co., 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Trent, supra*; *Perry, supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's denial of benefits in both the miner's and survivor's claims as it is supported by substantial evidence and is in accordance with law. *See Hobbs, supra*; *Neeley, supra*.

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properly accorded little to no weight as it was equivocal. *See Rose, supra*; *Justice, supra*; Claimant's Exhibit 3. Consequently, entitlement is precluded pursuant to 20 C.F.R. §718.205 as there is no credible medical evidence which establishes that the miner's death is due to pneumoconiosis. *See Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); Director's Exhibits 6-8, 12, 15; Claimant's Exhibits 1, 3; Employer's Exhibits 1-4, 6.

Accordingly, the administrative law judge's Decision and Order Upon Remand denying benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge