

BRB No. 08-0511 BLA
and 08-0589 BLA

B.W.)
(Widow of and on behalf of C.W.))
)
Claimant-Petitioner)
)
v.)
)
DEHUE COAL COMPANY)
) DATE ISSUED: 03/05/2009
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

B.W., Wilkinson, West Virginia, *pro se*.

Christopher Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order Denying Benefits (07-BLA-5330, 07-BLA-5331) of Administrative Law Judge Adele

¹ Claimant is the miner's widow. The miner died on April 13, 2002, while his sixth, and current claim was pending. Survivor's Director's Exhibit 5. Claimant is pursuing the miner's claim on his behalf. Claimant filed her claim for survivor's benefits on May 13, 2002. Survivor's Director's Exhibit 2.

Higgins Odegard rendered on a miner's subsequent claim and a survivor's 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 miner's prior claim for benefits, filed on January 20, 2000, was finally denied on July 7, 2000, by the district director because the miner failed to establish the existence of a totally disabling respiratory impairment. Miner's Director's Exhibit 5. On July 9, 2001, the miner filed his current claim, his sixth, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Miner's Director's Exhibit 7.

The administrative law judge credited the miner with forty years of coal mine employment,² as stipulated by the parties and supported by the record, and, with respect to the miner's claim, found that the medical evidence submitted since the prior denial of benefits established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge determined that claimant did not demonstrate a change in an applicable condition of entitlement in the miner's claim as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits in the miner's claim. Turning to the survivor's claim, the administrative law judge again found that the evidence of record established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, but further found that the evidence failed to establish that pneumoconiosis contributed to the miner's death, pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on the survivor's claim.

On appeal, claimant generally challenges the denial of benefits in both the miner's and survivor's claims. Employer responds, urging affirmance of the administrative law judge's denials of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Employer does not challenge the administrative law judge's length of coal mine employment determination, or her finding that, as all of the physicians of record agree that the miner suffered from pneumoconiosis, claimant established the existence of pneumoconiosis by autopsy and medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(2), (4), and by a preponderance of all the relevant evidence pursuant to

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

To be entitled to benefits under the Act in the miner's claim, 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing that the miner was totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Evaluating the new evidence relevant to the issue of total disability in the miner's claim, the administrative law judge properly found that, as all of the new pulmonary function and blood gas studies were non-qualifying,⁴ claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). See *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); Decision and Order at 15-16, 22-23; Miner's Director's

Island Creek Coal Co. v. Compton, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). We therefore affirm the administrative law judge's findings of forty years of coal mine employment, and that claimant established the existence of pneumoconiosis in both the miner's and survivor's claims. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

Exhibits 4, 5, 14. The administrative law judge also found, correctly, that the record contains no medical evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 23. Because substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Evaluating the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the weight of the medical opinion evidence did not support a finding that the miner had a totally disabling pulmonary or respiratory impairment. Decision and Order at 24. Specifically, Drs. Zaldivar, Castle, and Rasmussen opined that the miner retained the ability to perform his usual coal mine work, involving heavy manual labor, from a pulmonary standpoint. Decision and Order at 7-12, 24; Miner's Director's Exhibit 14; Miner's Employer's Exhibits 7, 8, 10, 11, 13, 14; Survivor's Director's Exhibit 31. In addition, Dr. Naeye opined that any impairment the miner may have had was due to cardiac failure, and not to any lesions of the lungs, and Dr. Oesterling stated only that the miner's emphysema and asthma, unrelated to coal dust exposure, "could have possibly very slightly limited his physical ability to do heavy labor." See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 8, 12; Miner's Employer's Exhibits 2, 5, 12; Survivor's Employer's Exhibits 5, 10, 14 at p. 41-43.

The administrative law judge found that, by contrast, Dr. Perper was the only physician to opine that the miner had "pulmonary impairment and disability." Decision and Order at 10-12, 24; Survivor's Director's Exhibit 48 at 45. However, the administrative law judge further found, correctly, that Dr. Perper did not state that the miner's condition was totally disabling. Moreover, the administrative law judge acted within her discretion in concluding that she was "unable to presume that [Dr. Perper] would be of such an opinion." See *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); Decision and Order at 24. Thus, the administrative law judge permissibly concluded that, as "[n]o physician of record clearly opined that the [m]iner was unable to perform his last coal mine employment," the medical opinion evidence did not support a finding that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 24.

The administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-126, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that the medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Finally, the administrative law judge properly considered the medical opinions together with the uniformly non-qualifying pulmonary function and blood gas study results of record in concluding that the preponderance of the evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). See *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); Decision and Order at 24. We therefore affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish that the miner was totally disabled. Consequently, we affirm the administrative law judge's finding that claimant did not establish a change in the applicable condition of entitlement since the denial of the miner's prior claim, and we affirm the denial of benefits pursuant to 20 C.F.R. §725.309(d). See *White*, 23 BLR at 1-7.

With respect to the survivor's claim, to establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge initially found that the evidence relevant to the cause of the miner's death consisted of treatment records from Logan General Hospital, and medical opinions from Drs. Zaldivar, Castle, Perper, and Naeye. The administrative law judge found that only Dr. Perper opined that

pneumoconiosis contributed to or hastened the miner's death. Decision and Order at 25-26.

Contrary to the administrative law judge's finding, the record also contains the autopsy report of Dr. Racadag, who opined that simple coal workers' pneumoconiosis "contributed to the [miner's] morbidity and subsequent demise." Survivor's Director's Exhibit 6. Further, the administrative law judge did not weigh the miner's death certificate, wherein Dr. Tuanquin, the miner's treating physician, indicated that simple coal workers' pneumoconiosis was a significant condition contributing to the miner's death. Survivor's Director's Exhibit 5. In addition, the record contains the contrary opinion of Dr. Oesterling, that the miner's coal workers' pneumoconiosis was too minimal to have caused, hastened, or contributed to the miner's death in any way. Survivor's Employer's Exhibit 5. Because the administrative law judge failed to consider these items of evidence together with the opinions of Drs. Zaldivar, Castle, Perper, and Naeye, the administrative law judge has not considered all of the relevant evidence, as required by the Act. *See* 30 U.S.C. §923(b); *Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334. Therefore, we must vacate the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and remand this case for consideration and discussion of all the evidence relevant to the cause of the miner's death in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Denying 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