BRB No. 12-0376 BLA

ETHEL ELAINE TOLLIVER (o/b/o and as Widow of MICHAEL LEE TOLLIVER)	)	
Claimant-Petitioner	)	
v.	)	
EASTERN ASSOCIATED COAL COMPANY	)	DATE ISSUED: 03/20/2013
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
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 Denying Benefits on Third Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Third Remand (2000-BLA-00882) of Administrative Law Judge Joseph E. Kane rendered on a duplicate miner's claim and a survivor's claim,[1] filed pursuant to the provisions of the Black Lung Benefits Act as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] On September 29, 2003 Administrative Law Judge Alice M. Craft awarded benefits in both the miner's claim and the survivor's claim. Pursuant to an appeal by employer, the Board vacated Judge Craft's award of benefits in both the miner's claim and the survivor's claim, and remanded the case for Judge Craft to reconsider, *inter alia*, the issue of pneumoconiosis.[3] *Tolliver v. Eastern Assoc. Coal Co.*, BRB No. 04-0129 BLA (Oct. 22, 2004)(unpub.). On March 23, 2006, Judge Craft again awarded benefits on both the miner's and the survivor's claim. Employer appealed, and the Board again remanded the case for the administrative law judge to reconsider, *inter alia*, the issue of pneumoconiosis. *Tolliver v. Eastern Assoc. Coal Co.*, BRB No. 06-0548 BLA (Mar. 26, 2007)(unpub.). On December 30, 2008, Judge Craft again awarded benefits, and employer appealed. The Board vacated Judge Craft's award, and remanded the case for reconsideration, *inter alia*, of the evidence on the issue of pneumoconiosis, holding that Judge Craft failed to properly consider the medical evidence pursuant to Section 718.202(a)(1) and (4), and failed to properly weigh the evidence together before determining that the existence of

[1] Claimant is the widow of the miner, Michael Lee Tolliver. The miner initially filed a claim for benefits on February 8, 1993. That claim was denied by the district director on July 20, 1993 because, although the miner established total respiratory disability, he did not establish the existence of pneumoconiosis. Claimant did not further pursue the claim. On May 16, 1995, the miner filed a duplicate claim for benefits. Director's Exhibit 1. While his duplicate claim was pending, the miner died on September 25, 1999. Claimant filed a survivor's claim on October 15, 1999. The claims were consolidated. Director's Exhibits 69, 70.

[2] On March 23, 2010, amendments to the Black Lung Benefits Act (the Act), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Because the instant claims were filed before January 1, 2005, the 2010 amendments do not apply in this case.

[3] The definition of pneumoconiosis encompasses either "clinical" or "legal" pneumoconiosis. 20 C.F.R. §718.201(a). "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis. 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

pneumoconiosis was established pursuant to Section 718.202(a).[4] Additionally, the Board granted employer's request to reassign the case to a different administrative law judge on remand. *Tolliver v. Eastern Assoc. Coal Co.*, BRB No. 09-0328 BLA (Jan. 29, 2010)(unpub.).

On remand, Administrative Law Judge Joseph E. Kane (the administrative law judge) accepted employer's stipulation that the miner had at least eighteen years of coal mine employment. He found that the evidence did not establish pneumoconiosis pursuant to each subsection of Section 718.202(a), and that the medical evidence, as a whole,[5] failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, the administrative law judge denied benefits on both the miner's and the survivor's claim.

On appeal, claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis in either the miner's or the survivor's claim.[6] Claimant also contends that the administrative law judge failed to properly weigh all the relevant evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), before determining that pneumoconiosis was not established. Additionally, claimant argues that the Board erred in ordering that this case be reassigned to a different administrative law judge on remand. Claimant contends, however, that because benefits were properly awarded in this case by Judge Craft, her decision can be reinstated and the Board need not remand the case. In response, employer argues that the administrative law judge properly found that the existence of pneumoconiosis was not established and urges affirmance of the denial of benefits on both the miner's and the survivor's claim. Employer further contends that the Board acted properly in ordering the reassignment of this case to a different administrative law judge and that claimant cannot challenge the Board's reassignment of the case in this appeal. Rather, employer contends that, if claimant

[4] Administrative Law Judge Alice M. Craft found that the existence of clinical pneumoconiosis was established by the x-ray evidence and that the existence of both clinical and legal pneumoconiosis were established by the medical opinion evidence.

[5] The administrative law judge considered all of the evidence of record in determining that the existence of pneumoconiosis was not established. We will not, therefore, consider his finding on material change pursuant to 20 C.F.R. §725.309(d) (2000). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

believed that reassignment of the case to a different administrative law judge was inappropriate, she should have requested reconsideration of the Board's decision. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.

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 the applicable law, they are binding upon this Board and may not be disturbed.[7] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

To establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 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, 22 BLR 2-251 (4th Cir. 2000).

[7] 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 mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 4.

Reassignment to Different Administrative Law Judge

Initially, claimant argues that the Board erred in reassigning the case to a different administrative law judge on remand. Claimant also argues that Judge Craft's previous award of benefits should be reinstated. Contrary to claimant's argument, the Board acted properly in remanding this case to a different administrative law judge when Judge Craft failed to comply with the Board's instructions. *Milburn Colliery Coal Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Further, contrary to claimant's argument, because the Board vacated Judge Craft's previous Decision and Order awarding benefits, that Decision and Order is a nullity and cannot be reinstated. *See United States v. Munsingwear*, 340 U.S. 36, 41 (1950); *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985); *see also Lane v. Union Carbide Co.*, 105 F.3d 166, 174 (4th Cir. 1997). Claimant's contentions are, therefore, rejected.

Pneumoconiosis

Pursuant to Section 718.202(a)(4), the case was remanded for reconsideration of the opinions of Drs. Albin, Jenkins and Rasmussen, who found that the miner had pneumoconiosis,[8] and the opinions of Drs. Tuteur, Renn and Dahhan, who found that the miner did not have pneumoconiosis.[9] In considering the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge properly rejected Dr. Albin's opinion because it was based on "significantly less … information than the other [opinions] of record." *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1

[8] Dr. Albin diagnosed a moderate to severe restrictive defect due to rheumatoid arthritis or coal dust inhalation. Director's Exhibit 32-12. Dr. Jenkins diagnosed probable pneumoconiosis by x-ray and a severe restrictive impairment. Director's Exhibits 22, 32-11, 48, 78. Dr. Rasmussen diagnosed coal workers' pneumoconiosis and a totally disabling respiratory impairment to which coal dust exposure was a possible major contributing cause. Director's Exhibits 9, 40.

[9] Drs. Tuteur and Renn each found that the miner did not have coal workers' pneumoconiosis, or any respiratory or pulmonary impairment related to coal dust exposure. Director's Exhibits 40, 46, 58; Employer's Exhibits 1, 3, 8, 11, 12.

Dr. Dahhan also found that the miner did not have coal workers' pneumoconiosis, or any respiratory or pulmonary impairment related to coal dust exposure. Director's Exhibits 42, 48; Employer's Exhibits 2, 13. The administrative law judge, however, accorded little weight to Dr. Dahhan's opinion because of inconsistencies in the two reports he authored.

(1986); Decision and Order at 27. The administrative law judge also rejected Dr. Albin's opinion, that "the [m]iner's moderate restrictive impairment is 'possibly' related to inhalation of coal mine dust," because it was equivocal. *See Hicks*, 138 F.3d at 532-33 n.9, 21 BLR at 2-335 n.9; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); Decision and Order at 27.

Next, the administrative law judge properly accorded little weight to the opinion of Dr. Rasmussen, that claimant had clinical pneumoconiosis, because it relied on a positive x-ray and a history of coal dust exposure, when the x-ray evidence as a whole failed to establish the existence of clinical pneumoconiosis. *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). The administrative law judge properly accorded little weight to Dr. Rasmussen's opinion that the miner had legal pneumoconiosis, because he found the doctor's statement that "one must include coal dust exposure as a 'possible' significant contributing factor" in the miner's respiratory disease to be equivocal. *See Hicks*, 138 F.3d at 532-33 n.9, 21 BLR at 2-335 n.9; *Griffith*, 49 F.3d at 186, 19 BLR at 2-117. Further, the administrative law judge properly found that Dr. Rasmussen's opinion was entitled to little weight because, unlike the other physicians, he is not a Board-certified pulmonologist.[10] *Hicks*, 138 F.3d at 536, 21 BLR at 341; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988).

Considering the opinion of Dr. Jenkins, that the miner had pneumoconiosis, the administrative law judge properly accorded it little weight because it was equivocal. Specifically, notwithstanding Dr. Jenkins's status as the miner's treating physician, the administrative law judge found that Dr. Jenkins's statements, that the nodules seen on the miner's x-rays were "probably" pneumoconiosis, and that the miner "probably" had pneumoconiosis, rendered his opinion equivocal. *See* 20 C.F.R. §718.104(d)(5); *Griffith*, 49 F.3d at 187, 19 BLR at 2-117.

Turning to the contrary opinions of Drs. Tuteur, Renn and Dahhan, the administrative law judge noted that all three are Board-certified pulmonologists. The administrative law judge accorded great weight to the opinion of Dr. Tuteur, because "Dr. Tuteur fully explained his reasoning, stating exactly why the underlying objective evidence supported his opinion."[11] Decision and Order at 30. Likewise, the

[10] The record reflects that Dr. Rasmussen is a Board-certified internist. Director's Exhibits 9, 40.

[11] In particular, the administrative law judge noted that Dr. Tuteur, after reviewing all the relevant medical evidence, opined that the miner's interstitial pulmonary fibrosis was not caused by pneumoconiosis. The administrative law judge found that because Dr. Tuteur reasoned that the fibrosis that was present in the miner was unassociated with the

administrative law judge accorded the opinion of Dr. Renn great weight because "Dr. Renn explained in great detail why the medical evidence does not support a finding of pneumoconiosis, and because the objective evidence is sufficient to support his opinion."[12] *Id*. at 31. Consequently, the administrative law judge found that the medical opinion evidence did not establish the existence of pneumoconiosis. *See Hicks*, 138 F.3d at 532-33 n.9, 21 BLR at 2-335 n.9; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Having found that the medical opinion evidence did not establish pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge weighed it, along with the x-ray, CT scan and biopsy evidence, and properly concluded that it failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton*, 211 F.3d at 211, 22 BLR at 2-173-74.

Because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, he properly found that claimant failed to establish entitlement to benefits in both the miner's and the survivor's claim. *See Trumbo*, 17 BLR at 1-87; *Perry*, 9 BLR at 1-2.

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coal dust macule, macro and micro nodules, and focal emphysema, the doctor was able to say with "reasonable medical certainty" that the fibrosis was not caused by coal dust, and therefore was not pneumoconiosis. Decision and Order at 30. The administrative law judge noted that Dr. Tuteur reviewed the miner's medical records, which included x-rays, CT scans, biopsy slides, reports of examinations, and objective testing. *Id*. at 12.

[12] The administrative law judge noted that Dr. Renn explained that he was able to rule out coal dust as the cause of the miner's fibrosis for several reasons. First, Dr. Renn reasoned that pneumoconiosis affects the respiratory bronchiole, but the miner's disease started between the alveolus and the blood vessel. Second, Dr. Renn found that the miner's biopsy did not reveal the coal macule present in the areas of the fibrosis. Third, Dr. Renn opined that the reticular pattern of the miner's lung disease was not uniform on both sides of the lung. Finally, Dr. Renn found that the nodular densities in the miner's lungs were more toward the periphery, which is unusual for coal workers' pneumoconiosis. In conclusion, Dr. Renn believed that the miner's fibrosis was idiopathic. He unequivocally opined that coal mine employment was not a cause of the miner's fibrosis. Decision and Order at 30-31. Dr. Renn conducted a physical examination of the miner, laboratory testing, as well as x-ray, CT scan, pulmonary function study and blood gas study. *Id*. at 14.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Third Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge