BRB No. 00-0401 BLA

VIRGINIA L. FARMER (Widow of BERNARD V. FARMER)	)	
Claimant-Petitioner	)	
v.	)	
HARMAN MINING CORPORATION C/O TERRA INDUSTRIES	)	DATE ISSUED:
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.
Virginia L. Farmer, Vansant, Virginia, *pro se*.[1]

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

Edward Waldman (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.
PER CURIAM:

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant[2], without the assistance of counsel, appeals the Decision and Order - Denying Benefits (99-BLA-0084) of Administrative Law Judge Richard K. Malamphy on a miner's duplicate claim and on 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 administrative law judge found that the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000)[3], in view of the finding of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000), but found the evidence was insufficient to establish total

[2] Claimant is Virginia L. Farmer, surviving widow of Bernard V. Farmer, the miner, who filed three applications for benefits with the Department of Labor (DOL). The first, filed on June 7, 1984, was denied by DOL on June 19, 1985. Director's Exhibit 34. The miner filed a second claim, a duplicate claim, on March 16, 1987. Administrative Law Judge Charles P. Rippey issued a Decision and Order dated August 1, 1990, denying the claim on the basis that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 35. The miner filed a third claim on November 21, 1994. Director's Exhibit 36. The miner died on November 11, 1995. Director's Exhibit 7. Claimant then filed her application for survivor's benefits with DOL on October 7, 1997. Director's Exhibit 1.

[3] 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 they 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.

respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000) in the miner's claim. The administrative law judge also found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000) in the survivor's claim. Accordingly, the administrative law judge denied both claims.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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, in response to claimant's appeal, asserts that the administrative law judge's finding that the evidence fails to establish total respiratory disability is supported by substantial evidence and accordingly, employer urges affirmance. Employer also contends that the miner's claim was not properly before the administrative law judge, as claimant failed to request a hearing with respect to this claim. Employer also asserts that the administrative law judge improperly found that Dr. Castle's 1996 pulmonary function study was qualifying when, in fact, claimant was 72 years old at the time of the test, and the tables set forth at Appendix B do not include qualifying values for 72 year old miners. Finally, employer asserts that the administrative law judge erred by considering evidence filed with the miner's original claim, in his consideration of the medical reports pertinent to the issue of total disability. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the Board should reject employer's contentions. Employer replies to the Director's response brief, contending the Director's contentions are misplaced and generally reasserting its original contentions.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) in order to establish entitlement to survivor's benefits. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations

implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those which the Board, after briefing by the parties to the claim, determines that the regulations at issue will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which both employer and the Director responded.[4] Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

Initially, we note that the administrative law judge applied the correct legal standard applicable to duplicate claims filed in cases which arise within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit. In such cases the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 763 (1997), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). The administrative law judge however, incorrectly referred to modification of the living miner claim, and stated that he found a "material" change in conditions. Decision and Order at 3. We note that this case involved a duplicate claim wherein a material change in conditions was properly found.

Employer initially contends that the miner's claim was never properly before the administrative law judge, as the miner never formally requested a hearing. Employer bases this contention upon the fact that when both claims were before the district director, the district director denied the survivor's claim first on January 20, 1998, Director's Exhibit 14, and then denied the miner's claim shortly thereafter on January 30, 1998. Director's Exhibit 36. Claimant's lay representative filed a request for a hearing on the survivor's claim on February 10, 1998, Director's Exhibit 10. Claimant's lay representative then filed a second request for a hearing on February 19, 1998, but apparently referenced the survivor's claim again. Director's Exhibit 21. The Director argues that employer failed to raise this issue at the hearing. Director's Brief at 2, n. 2. Employer replies that there was a discussion of this issue at the hearing, but that it took place off the record. We reject the Director's assertion

[4] Both employer and the Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case. Claimant has not filed a brief in response to the Board's Order.

that employer's contention is not timely raised, as it is jurisdictional in nature and may be raised at any time. *Kubachka v. Windsor Power House Coal Co.*, 11 BLR 1-171 (1988). The Director's assertion, that the intent of claimant's lay representative may have been to request a hearing in each of the two claims, however, appears valid. In light of employer's contention that some discussion concerning this issue was held off the record, and because this case is remanded to the administrative law judge for further findings on the merits, *see infra*, the administrative law judge is instructed, on remand, to entertain arguments concerning this issue on the record, and to render a formal finding as to whether claimant's lay representative intended to request a hearing with respect to the miner's claim.

With respect to the administrative law judge's finding at Section 718.204(c)(1) (2000),[5] the administrative law judge found that there were seven pulmonary function studies of record and that three produced qualifying values. Decision and Order at 4; Director's Exhibits 34, 35, 36. The administrative law judge stated:

> Considering the values recorded, I find that Claimant has not established total disability under this subsection. Testing in 1984 and in March 1987 was invalid. While results in September 1995 showed qualifying values, physicians have stated that this abnormality was due to severe heart disease which lead [sic] to death two months later.

Decision and Order at 4. The administrative law judge committed several errors in his consideration of the pulmonary function studies.

Initially, the administrative law judge found that Dr. Baxter's 1984 study and Dr. Sutherland's 1987 study were invalid because the record contained invalidation reports for these studies from Drs. Fino, Garzon, Castle and Renn. Director's Exhibits 34, 35, 36. The Board has held that an administrative law judge must specify why he chooses to credit an invalidation report by reviewing physicians over the statement by an administering physician that a pulmonary function study is valid. *See Seigel v. Director, OWCP*, 8 BLR 1-156 (1984).

Next, the administrative law judge improperly gave less weight to Dr. Castle's 1995 test, which yielded qualifying results, because he found that "physicians... stated that this abnormality was due to severe heart disease..." Decision and Order at 4. This is error, as a test which produces qualifying values is a qualifying test, regardless of the stated reason for the qualifying values. The Board has held that pulmonary function studies are only relevant

[5] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

to the issue of the presence of a respiratory or pulmonary impairment and are not determinative of the cause of that impairment. *See Castle v. Eastern Associated Coal Co.*, 12 BLR 1-105 (1988); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). Moreover, while the cause of the results may be relevant to a determination of whether the totally disabling impairment is due to pneumoconiosis at Section 718.204(c), the only issue at Section 718.204(b)(2) is whether the numerical values qualify or not. *Id*.

In addition, as employer correctly notes, the administrative law judge characterized Dr. Castle's 1995 test as qualifying when, in fact, the miner was 72 years old at the time of the test and the tables set forth at Appendix B only list qualifying values for miners 71 year old and younger. Employer, citing *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987), argues that the administrative law judge cannot utilize the tables for a 71 year old miner, asserting that no miner would be expected to work at the age of 72 because of his age . Employer's Brief at 12-13. We reject employer's contention, as *Tucker* stands for the proposition that it is improper for an administrative law judge to round blood gas study values prior to determining whether they are qualifying values[6] under the table for establishing total disability by blood gas studies. On remand, the administrative law judge must determine whether the pulmonary function study in question provided qualifying or non-qualifying values.

Further, the administrative law judge identified Dr. Sutherland's test as qualifying, but Dr. Sutherland failed to list any height observed or measured for the miner for this test. Dr. Sutherland found that the miner's height was 68 inches. Director's Exhibits 34, 35. The administrative law judge erred in utilizing the heights observed and stated by the doctors, rather than finding claimant's actual height and then applying it for all the tests, as required. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). In addition, the administrative law judge failed to cite or consider a pulmonary function study by Dr. Baxter dated March 5, 1995. Director's Exhibit 35. Finally, we reject employer's reliance on *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986) for the proposition that an administrative law judge must consider causative factors when considering pulmonary function study evidence. Employer's Brief at 13. In *Casella* the issue was invocation of the interim presumption at 20 C.F.R. Part 727. The issue in the instant case is total respiratory disability at 20 C.F.R. Part 718.204, where proof of total disability and proof of disability causation are separate issues and claimant bears the burden of proof to establish each element of entitlement.[7]

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

[7] In contrast, on rebuttal under the Part 727 regulations, it is employer who bears the

In light of the foregoing, we vacate the administrative law judge's finding of total respiratory disability based upon the pulmonary function studies. On remand, the administrative law judge must explain how he considers Dr. Castle's 1995 test to be qualifying in view of the fact that the miner was 72 years old at the time of the test. Further, the administrative law judge must consider all relevant evidence and reconsider his findings in light of the aforementioned errors. *See* 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge next considered the blood gas studies of record, and found that only one, Dr. Castle's September 5, 1995 study, produced qualifying values. Director's Exhibit 36; Decision and Order at 5. The administrative law judge discounted Dr. Castle's blood gas study because he noted that the qualifying results were due to heart disease, rather than pulmonary disability. Decision and Order at 5. This is error, as the relevant inquiry is whether the stated values qualify under the table set forth at Appendix C, without regard for the reason for those values. Blood gas studies are only relevant to the issue of the presence of a respiratory or pulmonary impairment and are not determinative of the cause of that impairment. *See generally Castle*, *supra*; *Piniansky*, *supra*. We vacate, therefore, the administrative law judge's findings. On remand, the administrative law judge must reevaluate all of the blood gas study evidence of record. *See* 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge correctly found that the record contains no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 5-6. We affirm, therefore, the administrative law judge's finding that total disability is not established by evidence of cor pulmonale. 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

The administrative law judge also found that the medical opinion evidence of record was insufficient to establish total disability. In doing so, the administrative law judge committed several errors.

In summarizing the evidence of record, the administrative law judge correctly found that in July of 1995 Dr. Patel was claimant's treating physician and that he concluded that the miner was totally disabled primarily due to pneumoconiosis. Decision and Order at 7; Director's Exhibit 36. In weighing the evidence, however, the administrative law judge failed to include Dr. Patel's opinion. This omission violates the Administrative Procedure Act, 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.

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burden of proof.

§919(d) and 30 U.S.C. §932(a), and mandates that the error be addressed on remand. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

Further, the administrative law judge stated that:

> [i]n the 1980s Drs. Baxter and Sutherland reported that the miner was totally disabled due to CWP. It is pertinent to note that numerous physicians have invalidated the testing results reported by Drs. Sutherland and Baxton (sic). In addition, the presence of CWP was not established until the 1990s.

Decision and Order at 8. In so stating, the administrative law judge repeated his error of crediting the invalidation reports over the statements by administering physicians, Drs. Sutherland and Baxter, regarding the validity of their pulmonary function studies, without providing a basis for doing so. *See Wojtowicz*, *supra*; *Shaneyfelt*, *supra*. We vacate, therefore, the administrative law judge's findings and instruct him to reweigh all of the relevant medical opinion evidence on remand at Section 718.204(b)(2)(iv).

In addition, we reject employer's contention, in its response brief, that the administrative law judge could not rely upon Dr. Sutherland's opinion alone to find total respiratory disability established. Consistent with the Fourth Circuit's holding in *Rutter*, the administrative law judge must consider all relevant evidence of record on the merits, regardless of the claim with which it was submitted. On remand the administrative law judge must consider all of the evidence of record and he must explain how he determined that pneumoconiosis was "not established until the 1990s." In addition, he must explain why the diagnoses by Drs. Baxter and Sutherland in the 1980's that claimant was totally disabled due to pneumoconiosis, are not reliable evidence of total disability merely because the administrative law judge concluded that the miner did not develop pneumoconiosis until the 1990s. *See* Decision and Order at 8. Should the administrative law judge find that total respiratory disability is established at one subsection of Section 718.204(b), he must weigh all of the evidence supportive of total disability against the contrary probative evidence of record. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-4 (1986). Further, should the administrative law judge find that the evidence establishes total respiratory disability, he must determine whether the evidence establishes total disability due to pneumoconiosis consistent with the standard set forth in the new regulations. 20 C.F.R. §718.204(c). Finally, the administrative law judge must also consider Dr. Patel's opinion that the miner is totally disabled due to pneumoconiosis when considering the relevant evidence on the issue of total disability causation.[8]

[8] We note that the administrative law judge identified Dr. Patel as claimant's treating physician in July of 1995 in his summary of the evidence of record. Decision and Order at 7.

Turning to the administrative law judge's consideration of the survivor's claim, the administrative law judge correctly concluded that the record contained opinions by Drs. Abrenio, Naeye, Harnsbarger and Kleinerman. Director's Exhibits 8, 9, 10, 23, 33; Decision

and Order at 10. The administrative law judge correctly found that the opinions were unanimous in stating that claimant suffered from mild pneumoconiosis, but that it did not hasten, contribute to, or cause the miner's death. *Id*. The administrative law judge rationally concluded that this evidence failed to establish a link between the miner's pneumoconiosis and his death. *See Bill Branch Corp. v. Sparks*, 213 F. 3d 186, 22 BLR 2- (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); 20 C.F.R. §718.205. We affirm, therefore, the administrative law judge's finding at Section 718.205, as it is supported by substantial evidence and consistent with applicable law. We affirm, therefore, the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge