BRB No. 02-0760 BLA

JUANITA BROCK (Widow of WHITT BROCK) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Juanita Brock, Tazwell, Tennessee, *pro se*.

Michael J. Rutledge, Jennifer U. Toth (Howard M. Radzely, Acting 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (99-BLA- 1144) of Administrative Law Judge John C. Holmes denying benefits on a duplicate miner's claim filed pursuant to the provisions of Title IV of the Federal Coal

[1] Ron Carson, a benefits counsel with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Charles V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] When this case was previously before the Board, the Board affirmed the administrative law judge's denial of the widow's claim because death due to pneumoconiosis was not established, but vacated the denial on the duplicate, miner's claim and remanded the case for consideration of whether the existence of pneumoconiosis was established in the miner's claim based on medical opinion evidence and, if reached, whether total disability was established. *Brock v. Director, OWCP*, BRB No. 01-0762 BLA (Apr. 23, 2002)(unpub.). The history of the case is also set forth in that decision. On remand the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis, total disability or total disability due to pneumoconiosis. Accordingly, benefits were denied on the miner's claim.

On appeal, claimant generally challenges the findings of the administrative law judge. In response, the Director, Office of Workers' Compensation Programs (the Director), argues that the administrative law judge's denial of benefits on the miner's claim must be vacated and the case must be remanded because the administrative law judge failed to consider all the evidence on the existence of legal pneumoconiosis.

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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-85 (1994); *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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[2] 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 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant first contends generally that the administrative law judge should have found the existence of pneumoconiosis established. The Director asserts that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of "legal" pneumoconiosis. The Director also points out that the miner's prior claim was denied based on his failure to establish total disability. The Director now concedes that the autopsy prosector's finding of cor pulmonale establishes total disability at 20 C.F.R. §718.204(b)(2)(iii), and, thereby, demonstrates a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Thus, the Director contends that the administrative law judge was obliged to consider all the medical opinions of record, not just the opinions of Drs. Hudson and Smith, when adjudicating the miner's claim on the merits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Moreover, the Director contends that the administrative law judge erred in finding that the opinions of Drs. Hudson and Smith did not establish the existence of legal pneumoconiosis, citing 20 C.F.R. §§718.201(a)(2), 718.202(a)(4).

At the outset, we agree with the Director that the administrative law judge must consider all the evidence of record in determining whether claimant has established entitlement to benefits on the miner's claim. The Director has conceded that a material change in conditions is established based on autopsy findings of cor pulmonale, which would establish total disability, assuming that the miner suffered from legal pneumoconiosis as found by Administrative Law Judge Samuel J. Smith in the prior claim, *see* 20 C.F.R. §718.204(b)(2)(iii), Director's Brief at 10-11. This case must, accordingly, be remanded. *See Ross*, *supra*.

Considering the new opinions of Drs. Hudson and Smith, the administrative law judge stated that he did not credit Dr. Hudson's finding as equivalent to a finding of pneumoconiosis. Decision and Order at 1 (unpaginated). A review of the evidence, however, shows that Dr. Hudson opined that claimant had chronic bronchitis caused by coal mine employment which, as the Board indicated in its previous decision, is clearly sufficient to support a finding of legal pneumoconiosis, if credible. 20 C.F.R. §718.201(a)(2); Director's Exhibit 10. The administrative law judge erred, therefore, in determining that Dr. Hudson's finding was not equivalent to a finding of pneumoconiosis under the Act. 20 C.F.R. §718.201(a)(2). Moreover, the administrative law judge's statement that Dr. Hudson's opinion, even if credited, would be overwhelmingly contradicted by the negative x-ray evidence is not determinative. With respect to the x-ray evidence, 20 C.F.R. §718.202(a) provides alternate methods for establishing the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). With respect to the physicians' opinions of record, while the administrative law judge indicated that Dr. Hudson's opinion would be contradicted by the other physicians' opinions, apart from a reference to Dr. Smith's opinion, the

administrative law judge failed to identify or discuss those opinions sufficiently. As Dr. Smith's opinion was the only opinion considered, in addition to Dr. Hudson's, and Dr. Smith diagnosed "possible pneumoconiosis," the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis doesn't encompass all of the opinions of record. Director's Exhibit 19. The administrative law judge's finding at Section 718.202(a)(4) is, therefore, vacated and the case is remanded for consideration of all the medical opinion evidence at that section. If the administrative law judge determines, on remand, that claimant has established the existence of pneumoconiosis, he must then consider whether claimant has established the other elements of entitlement in the miner's claim. 20 C.F.R. §§718.203, 718.204; *see Ross*, *supra*.

[3] The administrative law judge noted that even if he were to find total disability established based on the autopsy evidence of cor pulmonale, no benefits would be awarded on the miner's claim since cor pulmonale was not diagnosed until the time of the miner's death. Decision and Order at 2 (unpaginated). We agree with the Director, however, that benefits could ensue on the miner's claim inasmuch as the evidence of cor pulmonale would show, not that the miner became totally disabled on the date of the evidence showing cor pulmonale, but that he became totally disabled at some time prior to that date. *See Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Shupink v. LTV Steel Co.*, 17 BLR 1-24, 1-30 (1992). Further, if the administrative law judge finds that the onset date cannot be determined based on the evidence, the miner would be entitled to benefits starting on the first day of the month in which he filed his claim. 20 C.F.R. §725.503(b); *see* Director's Brief at 17 n.9. Remand of this case is, therefore, necessary.

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge