BRB No. 03-0630 BLA

SANDRA COLEGROVE (Widow of FREDDIE COLEGROVE)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 05/26/2004
ISLAND CREEK COAL COMPANY	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-0099) of Administrative Law Judge Daniel L. Leland denying benefits 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).[1] Based on

[1] 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, 722,

the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718 (2000).[2] Employer has conceded that the miner established thirty-eight years of coal mine employment and the existence of coal workers' pneumoconiosis. Hearing Transcript at 5. However, the administrative law judge found the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) (2000), or that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). 30 U.S.C. §921(c)(3). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence in finding that the miner's death was not due to pneumoconiosis at Section 718.205(c) (2000), and Section 718.304 (2000). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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 applicable law, they are binding upon this Board and may not be disturbed. 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 survivor's claim filed after 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. 20 C.F.R. §718.205(c) (2000). Death will be

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725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that the miner, Freddie Colegrove, filed an application for benefits on January 28, 1988. Benefits were awarded by Administrative Law Judge Neusner on September 27, 1991, and are not at issue herein. Director's Exhibit 27. The miner died on August 21, 1999, and claimant filed an application for survivor's benefits on September 23, 1999. Director's Exhibits 1, 5. The district director repeatedly denied the survivor's claim as claimant did not establish that the miner's death was due to pneumoconiosis, and the case was referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 8, 17, 23, 25.

considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death; if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death; if death was caused by complications of pneumoconiosis; or if the presumption set forth at Section 718.304 (2000) is applicable. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.205(c)(1)-(3) (2000). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5) (2000).[3] *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c) (2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Claimant argues that since the Decision and Order awarding benefits in the living miner's claim necessarily included a determination that the miner's total disability was due in part to pneumoconiosis, the administrative law judge in the survivor's claim was collaterally estopped from crediting a doctor's report regarding the cause of the miner's death, if the doctor also found that the miner's pneumoconiosis was not totally disabling. The doctrine of collateral estoppel precludes "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994); *see Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987). The Decision and Order in the present case indicates that the administrative law judge found that the doctrine of collateral estoppel was inapplicable since "the issue in the present case is whether the miner died due to pneumoconiosis not whether he was totally disabled due to pneumoconiosis." Decision and Order at 9. As the administrative law judge in the present claim has correctly determined that the issue of total disability is not identical to the cause of the miner's death, the relevant issue in the survivor's claim, the administrative law judge properly found the doctrine of collateral estoppel inapplicable. *See Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999).

Consequently, the administrative law judge properly considered all the medical reports relevant to the cause of the miner's death regardless of their diagnoses concerning total disability, and acted within his discretion as the trier of fact in crediting the opinions of Drs. Spagnolo, Fino, Zaldivar, Castle and Ghio, all

[3] Since the miner's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

of whom concluded that the miner's pneumoconiosis did not contribute to his death, based on their thorough review of the record evidence and their well-reasoned reports. Decision and Order at 7-9; Employer's Exhibits 4-6; 8-16; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo*, 17 BLR 1-85; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also permissibly found Dr. Grey's report which stated that the miner's pneumoconiosis contributed to his death, undocumented and unreasoned, as the doctor's rationale for his opinion was "indefinite and vague" and his opinion was based primarily on the miner's coal mine employment history and the award of benefits in the living miner's claim. Decision and Order at 8; Claimant's Exhibit 7; Director's Exhibit 24; *Billips v. Bishop Coal Co.*, 76 F.3d 371, 20 BLR 2-130 (4th Cir. 1996); *Trumbo*, 17 BLR 1-85; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As the administrative law judge's findings are supported by substantial evidence, they are affirmed. 20 C.F.R. §718.205(c) (2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by Section 718.304 (2000), claimant contends that the administrative law judge erred in his consideration of the evidence relevant to the existence of complicated pneumoconiosis. Regarding the July 31, 1999 x-ray film, claimant argues that the administrative law judge erred by failing to consider the interpretations of Drs. Miller, Cappiello and Ahmed finding the presence of complicated pneumoconiosis, because the administrative law judge improperly relied on the opinions of Drs. Wheeler, Scott and Scatarige that this digital film could not be classified under the ILO system. Claimant asserts that even if this film cannot be classified under the ILO system, it is relevant evidence which establishes the presence of complicated pneumoconiosis pursuant to Section 718.304 (2000), and must be admitted pursuant to 20 CF.R. §718.107 (2000). We disagree.

The Decision and Order indicates that the administrative law judge considered the aforementioned interpretations of this digital x-ray, but acted within his discretion as the finder of fact, in rejecting the diagnoses of complicated pneumoconiosis, based on the opinions of Drs. Wheeler, Scott and Scatarige that the film cannot be classified because it is a digital image, and the opinion of Dr. Wiot that the film was of poor quality, a finding concurred in by Drs. Miller, Cappiello and Ahmed. Decision and Order at 9-10; Claimant's Exhibits 3-5; Employer's Exhibits 7, 18, 20, 22; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Further, we reject claimant's contention that the July 31, 1999 digital film is acceptable evidence pursuant to Section 718.107 (2000). The regulations permit a party to submit for consideration, other medical evidence, not addressed in 20 C.F.R. Part 718, subpart B, which tends to demonstrate the presence or absence of

pneumoconiosis. 20 C.F.R. §718.107(a) (2000). Based on the administrative law judge's findings, claimant has not demonstrated that the July 31, 1999 digital x-ray established complicated pneumoconiosis in this case with medically acceptable evidence. 20 C.F.R. §718.107(b) (2000). As none of the other x-ray readings of record indicated the presence of complicated pneumoconiosis, the administrative law judge rationally determined that the x-ray evidence of record did not establish the existence of complicated pneumoconiosis. Decision and Order at 10; Employer's Exhibits 1, 3; Claimant's Exhibits 1, 2; *see Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

With respect to the August 1, 1999 CT scan, claimant contends that the administrative law judge erred in crediting the reports of Drs. Wiot, Wheeler and Scott regarding the existence of complicated pneumoconiosis, since these physicians failed to diagnose the presence of simple pneumoconiosis, to which the parties had stipulated. We find no merit in claimant's argument. It appears that employer stipulated to the existence of pneumoconiosis because it was established by biopsy evidence and medical evidence. Although the administrative law judge in the miner's claim had also found simple pneumoconiosis established by x-ray evidence, that was only by application of the true doubt rule, which is now inapplicable. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Because employer's stipulation to the existence of pneumoconiosis was not based upon the weight of the CT scan evidence or even the x-ray evidence, the stipulation does not undermine the credibility of the CT scan readings finding no pneumoconiosis. The record indicates that five physicians reviewed this CT scan. Drs. Wiot, Wheeler and Scott, concluded that the scan did not indicate the presence of complicated pneumoconiosis, while Drs. Cappiello and Miller interpreted the CT scan as revealing the presence of this condition. Employer's Exhibits 7, 17, 19; Claimant's Exhibits 4, 6. It was within the administrative law judge's discretion as the fact-finder to rely upon the weight of the evidence, *i.e.*, the opinions of Drs. Wiot, Wheeler and Scott, regarding the absence of complicated pneumoconiosis, the relevant issue at Section 718.304 (2000), notwithstanding their findings regarding the absence of simple pneumoconiosis. Decision and Order at 10; Employer's Exhibits 7, 17, 19; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, the administrative law judge rationally found that the "preponderance of the interpretations of the August 1, 1999 CT scan fail to demonstrate large opacities or massive lesions." Decision and Order at 10; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Lafferty*, 12 BLR 1-190.

The administrative law judge further considered the reports of Drs. Hansbarger and Kleinerman, who indicated that the miner's March 1983 lung biopsy revealed only simple pneumoconiosis; the administrative law judge found that claimant had failed to establish the existence of complicated pneumoconiosis.

Decision and Order at 10. As the administrative law judge has considered all the evidence relevant to this issue, and has provided a rational basis for his findings, substantial evidence supports his determination that claimant is not eligible for the Section 718.304 presumption. *Lester*, 993 F.2d 1143, 17 BLR 2-114.

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*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Since substantial evidence supports the administrative law judge's findings that pneumoconiosis did not contribute to the miner's death, or that the miner suffered from complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000), or entitlement to the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. We further affirm the denial of survivor's benefits. *Shuff*, 967 F.2d 977, 16 BLR 2-90.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge