

BRB No. 03-0790 BLA

RUTH ENDICOTT )  
(Widow of AUXIER ENDICOTT) )

Claimant-Petitioner )

v. )

MARTIKI COAL CORPORATION )

DATE ISSUED: 05/25/2004

and )

MAPCO, INCORPORATED )

Employer/Carrier- )  
Respondents )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )

Party-in-Interest )

DECISION and ORDER

Appeal of the Third Decision and Order on Remand - Denial of Benefits of  
Thomas F. Phalen, Jr., Administrative Law Judge, United States  
Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg,  
Kentucky, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals  
Judges.

PER CURIAM:

Claimant appeals the Third Decision and Order on Remand - Denial of Benefits (1999-BLA-357) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a miner's 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).<sup>1</sup> This case, involving a miner's duplicate claim for benefits pursuant to 20 C.F.R. §725.309(d) (2000) and a survivor's claim, has been before the Board previously. The full procedural history is set forth in *Endicott v. Martiki Coal Corp.*, BRB No. 02-0203 (Nov. 26, 2002)(unpub.)(McGranery, J., concurring in part and dissenting in part.)

In *Endicott*, the majority vacated the administrative law judge's award of benefits in both the miner's claim and the survivor's claim and remanded the case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §§718.202(a), 718.204(c) and 718.205(c).

On remand, the administrative law judge applied the standards set forth in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), and found that the evidence developed since the denial of the miner's prior claim established that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge thus concluded that claimant demonstrated a material change in conditions in the miner's claim as required by Section 725.309(d) (2000), but that upon a *de novo* review of the entire evidentiary record, claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits on both the miner's claim and the survivor's claim. On appeal, claimant contends that the administrative law judge erred in finding that Dr. Caruso's medical opinion was not well-reasoned and urges reversal of the denial of benefits. Employer responds to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal. Claimant filed a reply brief, reiterating her contentions.

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<sup>1</sup> 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, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 into the Act 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 establish 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 of claimant to establish any one of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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. §§718.201, 718.202, 718.203, 718.205(a)(1)-(3); *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). 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 a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or 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)-(3). 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR 1-26.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge considered the entirety of the relevant medical opinion evidence and acted within his discretion in concluding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Contrary to claimant's contention, the administrative law judge properly reviewed the evidence of record in accordance with the Board's remand instructions in reaching

his conclusion. He rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo*, 17 BLR 1-85; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry*, 9 BLR 1-1; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order on Remand at 6-22.

Claimant argues that the administrative law judge exceeded the scope of the Board's remand instructions in rejecting the opinions of Dr. Caruso on remand after having credited these opinions in his prior decisions. Claimant contends that the administrative law judge erred by reaching a different conclusion on remand because the administrative law judge's previous "finding that Dr. Caruso's opinion was well-documented and well-reasoned was the 'law of the case' and controlling on the issue." Claimant's Brief at 11. This contention lacks merit. Contrary to claimant's contention, the administrative law judge was not bound by his previous findings when he rendered his decision on remand. *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1995); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). The Board vacated the administrative law judge's Decision and Order and instructed him to address all of the relevant evidence of record and determine if the existence of pneumoconiosis was established. The administrative law judge had not previously considered this issue because the existence of pneumoconiosis had been established in an earlier proceeding by application of the "true doubt" rule. The United States Supreme Court invalidated this rule in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). The Board thus returned the parties to the *status quo ante* the prior decisions. *Dale*, 8 BLR 1-119. Regardless of his previous findings, therefore, the administrative law judge provided a proper rationale and an adequate explanation for discrediting the opinions of Dr. Caruso as the physician failed to provide a rationale for his diagnosis of pneumoconiosis. Decision and Order on Remand at 16. We, therefore, reject claimant's contention that the administrative law judge exceeded the scope of the remand instructions.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally concluded that the medical opinion of Dr. Caruso was not well reasoned, and the administrative law judge rationally relied on the more credible medical opinions to find that the existence of

pneumoconiosis was not established, claimant has not met her burden of proof on an essential element of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record 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*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as claimant makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded in both claims. *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge