

BRB No. 04-0678 BLA

MARTHA G. HERRON)
(Widow of RAYMOND D. HERRON))
)
Claimant-Respondent)
)
v.)
)
ELM GROVE COAL COMPANY) DATE ISSUED: 05/10/2005
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits Upon Remand by the Benefits Review Board of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington & Lee University Legal Clinic), Lexington, Virginia, for claimant.

Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits Upon Remand by the Benefits Review Board (2001-BLA-0733) (Decision and Order on Remand) of

Administrative Law Judge Robert J. Lesnick (the administrative law judge) on a 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 This survivor's claim is before the Board for a second time.

In his initial Decision and Order, the administrative law judge credited the miner with at least nineteen years of coal mine employment and found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). He further found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits.

Subsequent to an appeal by employer, however, the Board vacated the award of benefits and remanded the case to the administrative law judge for reconsideration because the administrative law judge had not explained why he found the opinions of Drs. Hersey and Templeton, the miner's treating physicians, entitled to greater weight than the opinions of the non-treating physicians and because the administrative law judge failed to consider the opinion of Dr Branscomb, that the miner's death was not due to pneumoconiosis. Accordingly, the Board remanded the case for the administrative law judge to reconsider these reports along with the conflicting medical evidence on the existence of pneumoconiosis and the cause of death.² Although the Board affirmed the award of

¹ Claimant, Martha G. Herron, is the widow of the miner, Raymond Herron, who died on February 1, 2000. Claimant filed her survivor's claim on February 24, 2000. Director's Exhibit 1. The death certificate lists the miner's cause of death as acute myocardial infarction with no other causes or contributing factors listed. Director's Exhibit 7. At the time of his death, the miner was receiving benefits pursuant to a claim he filed on August 22, 1983. *See Herron v. Elm Grove Coal Co.*, BRB No. 91-0273 BLA (Mar. 22, 1993). Director's Exhibit 26. The miner's award is not before the Board at this time Claimant is not eligible for derivative survivor's benefits based on the filing date of the miner's claim. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988).

² In vacating the award of benefits and remanding the case for reconsideration, however, the Board affirmed much of the administrative law judge's analysis of the evidence at 20 C.F.R. §718.202(a)(4). Specifically, the Board held that, contrary to employer's assertion, the administrative law judge did not accord absolute deference to the opinions of examining physicians to the exclusion of the non-examining physicians. *Herron v. Elm Grove Coal Co.*, BRB No. 03-0164 BLA (Oct. 31, 2003). The Board further held that, contrary to employer's assertion, the administrative law judge did explain why he gave greater weight to the opinions of Drs. Perper and Koenig diagnosing the existence of

attorney's fees, it held that the award would not become effective, and was not therefore enforceable, until the claim was successfully prosecuted. *Herron v. Elm Grove Coal Co.*, BRB No. 03-0164 BLA (Oct. 31, 2003).

On remand, the administrative law judge found that the opinions of Drs. Hersey and Templeton were entitled to special weight, explaining why their status as the miner's treating physicians made their opinion especially credible. Considering their opinions along with the other opinions of record, the administrative law judge again found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a) (4). Considering the opinion of Dr. Branscomb, that the miner's death was not due to pneumoconiosis, the administrative law judge accorded it minimal weight because Dr. Branscomb found neither the presence of clinical or legal pneumoconiosis, contrary to his own finding of legal pneumoconiosis, and the doctor did not even consider whether death could be due to pneumoconiosis assuming that the presence of pneumoconiosis had been established. In weighing Dr. Branscomb's opinion along with the other relevant evidence, the administrative law judge concluded that the evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, survivor's benefits were awarded.

On appeal, employer contends that the administrative law judge impermissibly accorded greater weight to the opinions of Drs. Hersey and Templeton because they were treating physicians when he should have accorded greater weight to the opinions of the physicians with superior credentials. Employer also argues that the weight of the evidence fails to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Employer further argues that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant, in response, urges that the award of benefits be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) has filed a brief for the limited purpose of arguing that the administrative law judge permissibly accorded additional weight to the opinions of Drs. Templeton and Hersey, the miner's treating physicians.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and

pneumoconiosis, than to the contrary opinions of Drs. Branscomb and Fino. *Herron*, BRB No. 03-0164 BLA at 9. The Board also held that the administrative law judge's analysis of the evidence of pneumoconiosis was in accord with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co., v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) requiring that all evidence relevant to the existence of pneumoconiosis be weighed together.

in accordance with applicable 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 asserts that the administrative law judge did not comply with the Board’s remand instructions and erred in according superior weight to the opinions of the miner’s treating physicians, Drs. Templeton and Hersey, both of whom diagnosed the existence of pneumoconiosis, over the contrary opinions of the better-qualified, board-certified pulmonary specialists, Drs. Altmeyer, Fino and Branscomb. Director’s Exhibits 8, 21, 26; Employer’s Exhibits 2, 5, 7, 8. Employer asserts that the administrative law judge’s crediting of the opinions of treating physicians was impermissibly mechanical and that the administrative law judge failed to consider the treating physician’s opinions in light of the factors enunciated at 20 C.F.R. §718.104(d).³ Employer further argues that Dr. Hersey, himself, never specifically opined that the miner suffered from pneumoconiosis and that the administrative law judge was “without authority to override the previous finding of the Board” that Dr. Hersey did not treat the miner’s pulmonary condition, Employer’s Brief at 18; Decision and Order on Remand at 3.

Contrary to employer’s assertion, the regulation at Section 718.104(d) applies only to those treating physicians’ opinions developed after January 19, 2001, the effective date of the amended regulations. 20 C.F.R. §718.101(b); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). Review of Dr. Templeton’s records shows that the physician treated the miner between the years 1981 and 1984, and that the physician did not provide an opinion dated subsequent to January 19, 2001. Further, review of Dr.

³ Section 718.104(d) provides, in pertinent part, that an adjudication officer shall take into consideration the following factors in weighing the opinion of the miner’s treating physician:

- (1) Nature of relationship.
- (2) Duration of that relationship.
- (3) Frequency of treatment.
- (4) Extent of treatment.

In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer’s decision to give that physician’s opinion controlling weight, providing that the weight given to the opinion shall also be based on the credibility of the physician’s opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(1)-(5).

Hersey's medical reports shows that only the physician's deposition, provided on November 19, 2001, Employer's Exhibit 8, would be subject to the Section 718.104(d) requirements. Moreover, even if the regulations were deemed applicable to all of the treating physician opinion evidence, the administrative law judge's analysis is in substantial compliance with the regulation, *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 512, 22 BLR 2-625, 2-655 (6th Cir. 2003), and, contrary to employer's assertion, is in accordance with the Board's remand instructions to the administrative law judge to provide his bases for according greater weight to the opinions of Drs. Hersey and Templeton because they were the miner's treating physicians. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *see also Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (opinions of treating physicians get the deference they deserve based on their power to persuade).

In considering Dr. Templeton's opinion, the administrative law judge found that the physician treated the miner for four years and during that treatment period saw claimant "frequently." Decision and Order on Remand at 2. The administrative law judge further found that Dr. Templeton treated a range of the miner's medical problems as well as his pulmonary condition. The administrative law judge, therefore, reasonably concluded that Dr. Templeton's diagnosis of coal workers' pneumoconiosis was entitled to enhanced weight. *See Grizzle*, 994 F.2d 1093, 17 BLR 2-123; *see also Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

In considering Dr. Hersey's opinions, the administrative law judge found that the physician saw the miner over forty times in his office, was aware of and treated a broad range of the miner's medical problems over the years, including the miner's pulmonary problems, and supported his conclusions with the results of objective studies. Decision and Order at 4-5. The administrative law judge's findings are, therefore, consistent with the provisions at Section 718.104(d), *see Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-655, and the administrative law judge provided a reasonable basis for according greater weight to the opinions of Drs. Hersey and Templeton. *See Grizzle*, 994 F.2d 1093, 17 BLR 2-123; *see also Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Although the Board previously stated that the record did not indicate that Dr. Hersey treated the miner's pulmonary condition, *Herron*, BRB No. 03-0164 BLA at 6, further review of the record and the administrative law judge's Decision and Order on Remand demonstrates that Dr. Hersey did, in fact, treat the miner for pulmonary conditions. Director's Exhibit 8; Employer's Exhibit 8. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *see Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988); *see generally Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see*

also *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Moreover, contrary to employer's assertion, review of Dr. Hersey's opinion demonstrates that the physician specifically diagnosed the miner with pneumoconiosis. While Dr. Hersey initially stated that his diagnosis of pneumoconiosis was based upon Dr. McNamara's diagnosis, Dr. Hersey later reached the same diagnosis independently based on the miner's x-rays, employment history and examination. Employer's Exhibits 15-16, 32-33. The administrative law judge has, therefore, complied with the Board's remand instructions and has provided reasonable bases for crediting the opinions Dr. Hersey and Dr. Templeton, the miner's treating physicians.

Next, we reject employer's assertion that the administrative law judge impermissibly found the opinions of Drs. Altmeyer, Fino and Branscomb, that the miner did not have pneumoconiosis, to be outweighed by the opinions of the physicians who found the existence of pneumoconiosis. The record consists of relevant reports by Drs. Altmeyer, Branscomb, DelVecchio, Fino, Garson, Hersey, Koenig, Levine, Perper, Reddy, Saludes and Templeton.⁴ Only Drs. Altmeyer, Branscomb and Fino opined that the miner did not suffer from pneumoconiosis. Director's Exhibit 26; Employer's Exhibits 1, 4-6, 9, 12-14, 22, 23, 28-30. Drs. DelVecchio, Hersey, Koenig, Levine, Perper and Templeton opined that the miner suffered from pneumoconiosis, Director's Exhibit 26; Claimant's Exhibits 10, 11; Employer's Exhibits 8 at 15, 33, 31 at 93. Dr. Saludes opined that the miner suffered from black lung disease. Director's Exhibits 8, 10. Similarly, Dr. Garson opined that the miner suffered from a chronic obstructive pulmonary disease that was industrially related. Director's Exhibits 26, 49.

In considering all of the evidence pursuant to Section 718.202(a)(4), the administrative law judge, as discussed *supra*, provided reasonable bases for according enhanced weight to the opinions of Drs. Hersey and Templeton. The administrative law judge further found that the opinions of Drs. Koenig and Perper were entitled to superior weight, a reiteration of his previous finding which was affirmed by the Board.⁵ Although,

⁴ In a report dated August 10, 1977, Dr. Paal opined that the miner's severe disabling chronic obstructive lung disease was not related to coal dust exposure. Director's Exhibit 26. The administrative law judge did not, however, consider Dr. Paal's opinion in weighing the conflicting medical opinion evidence at 20 C.F.R. §718.202(a)(4). Any error in not considering this opinion would, however, be harmless since consideration of the opinion would not change the outcome of the administrative law judge's finding on the existence of pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵ The Board held that the administrative law judge permissibly accorded greater weight to the opinions of Drs. Koenig and Perper on the issue of pneumoconiosis as he found them to be better supported by the underlying documentation of record than the contrary opinions. *Herron*, BRB No. 03-0164 BLA at 8-9; see *Clark v. Karst-Robbins Coal*

employer correctly notes the brevity of the administrative law judge's determination at Section 718.202(a)(4), such determination is nonetheless supported by substantial evidence and does not constitute an abuse of discretion. *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 805, 21 BLR 2-302, 2-311 (4th Cir. 1998); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Moreover, the administrative law judge was aware of all the physicians' credentials. *Administrative Law Judge's Decision and Order dated October 15, 2002*. Accordingly, the administrative law judge has complied with the Board's remand instructions to explain why the opinions of Drs. Hersey and Templeton, as treating physicians, are entitled to special weight and to consider all medical opinion evidence relevant to the existence of pneumoconiosis. Accordingly, we affirm the administrative law judge's finding that the evidence supports a finding of pneumoconiosis pursuant to Section 718.202(a)(4).

Finally, employer asserts that the administrative law judge again erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The record consists of the death certificate and reports by Drs. Altmeyer, Branscomb, Fino, Hersey, Koenig and Perper. While Drs. Altmeyer, Branscomb and Fino opined that pneumoconiosis did not contribute to the miner's death, Employer's Exhibits 1, 4-6, 9, 12-14, 22, 23, 28-30, Drs. Hersey, Koenig and Perper opined that pneumoconiosis contributed to the miner's death, Claimant's Exhibits 10-12; Employer's Exhibits 8, 31.⁶

When this case was previously before the Board, the Board held that the failure of the administrative law judge to address Dr. Branscomb's opinion, that coal mine dust exposure did not contribute to the miner's death, constituted error. Accordingly, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and remanded the case for consideration of Dr. Branscomb's opinion and further weighing of all the medical opinions. *Herron*, BRB No. 03-0164 BLA at 11-12.

Co., 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

⁶ Employer has asserted, in a footnote, that the revised regulation at Section 718.205 should not be applicable in the instant case as it is retroactive in nature. Employer's Brief at 2, fn.3. Employer's assertion is rejected, however, as the revised regulation has not drastically changed the legal definition of death due to pneumoconiosis, but has merely codified existing law. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93, *cert. denied*, 506 U.S. 1050 (1993).

On remand, the administrative law judge considered Dr. Branscomb's opinion and found it entitled to minimal weight as the doctor specifically found no evidence of clinical or legal pneumoconiosis, and had not even considered whether the miner's death could have been due to pneumoconiosis, assuming, hypothetically, that the miner had pneumoconiosis. The administrative law judge found the doctor's opinion entitled to minimal weight because it contradicted his own finding that the weight of the evidence established the presence of legal pneumoconiosis. Decision and Order on Remand at 6. Accordingly, the administrative law judge stated, for the reasons set forth in his previous decision, that the well-reasoned opinions of Drs. Perper, Koenig and Hersey outweighed the contrary opinions of Drs. Altmeyer, Fino and Branscomb and established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Dr. Branscomb, specifically stated, that "[n]either any effect of exposure to coal mine dust nor, should it be present, coal workers' pneumoconiosis had any significant effect whatsoever on [claimant]'s symptoms, his clinical course, or his death." Employer's Exhibit 6; Employer's Brief at 25. Thus, the administrative law judge erred insofar as he stated that Dr. Branscomb did not opine as to whether pneumoconiosis, assuming that it did exist, could have caused death. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). However, because the administrative law judge clearly rejected the opinion of Dr. Branscomb because he had not found either the existence of clinical or legal pneumoconiosis and the administrative law judge had found the existence of legal pneumoconiosis established, the administrative law judge's accordance of minimal weight to Dr. Branscomb's opinion was proper. See *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821, 19 BLR 2-86 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge's finding that the evidence, as a whole, establishes that the miner's death was due to pneumoconiosis is, therefore, reasonable and supported by substantial evidence in the record.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits Upon Remand by the Benefits Review Board is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge