

BRB No. 07-0732 BLA

C.S., on behalf of)
H.S. (Deceased Miner))
)
and)
)
J.S. (Widow of H.S.)) DATE ISSUED: 05/30/2008
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2006-BLA-05208 and 2006-BLA-00017) of Administrative Law Judge Donald W. Mosser (the administrative law judge) with respect to a duplicate 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).¹ The miner’s duplicate claim, filed on June 5, 2000, is before the Board for the second time.² The survivor’s claim was filed on October 27, 2004. Adjudicating both the miner’s claim and the survivor’s claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with eleven and one-half years of coal mine employment, based on a stipulation by the parties. Addressing the miner’s duplicate claim pursuant to 20 C.F.R. §725.309 (2000), the administrative law judge found the newly submitted medical evidence insufficient to establish that the miner was totally disabled due to pneumoconiosis.³ Consequently, he

¹ Claimant, C.S., is the daughter of the miner and his widow. On April 11, 2005, claimant was designated by the Department of Labor as the contact person for both the miner’s claim and the survivor’s claim because J.S., the widow, was deemed incapable of handling any benefits to which she may be entitled under the Act. Director’s Exhibits 73, 74.

² Initially, Administrative Law Judge Rudolf L. Jansen found that the miner’s 1976 and 1985 claims were denied because the evidence failed to establish that the miner’s total disability was due to pneumoconiosis. February 28, 2002 Decision and Order (2002 Decision and Order) at 3-4, 6. Weighing the medical evidence submitted since the 1994 denial, Judge Jansen found the evidence insufficient to establish total disability due to pneumoconiosis. 2002 Decision and Order at 12. Consequently, he found that the miner failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, benefits were denied. In light of the miner’s death on June 16, 2001, claimant, on behalf of the miner, appealed the denial to the Board. Pursuant to a Motion to Remand filed by the Director, Office of Workers’ Compensation Programs (the Director), the Board vacated Judge Jansen’s denial of benefits and remanded the case to the district director for a complete pulmonary evaluation, based on the Director’s concession that the Department of Labor failed to fulfill its statutory obligation under Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). [*C.S.*] *v. Director, OWCP*, BRB No. 02-0581 BLA (Feb. 27, 2003)(unpub.).

³ The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the present one, that were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

found that claimant failed to establish a material change in the miner's condition pursuant to Section 725.309 (2000). With regard to the survivor's claim, the administrative law judge found the medical evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the miner's claim and the survivor's claim.

On appeal, claimant contends that the district director erred in rejecting the statutorily mandated complete pulmonary evaluation and that equitable estoppel should be applied to preclude the denial of benefits. In addition, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis in the miner's claim and that the evidence in the survivor's claim is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). In response, the Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging the Board to remand the miner's and survivor's claims to the district director for further evidentiary development in order to satisfy the Director's statutory duty pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a).⁴ In addition, the Director urges the Board to reject claimant's argument that equitable estoppel is applicable in the miner's claim and that benefits should be awarded because claimant has not adequately explained how the criteria for establishing equitable estoppel have been met. In a reply brief, claimant objects to the Director's Motion to Remand, arguing that the Director has previously requested remand for exactly the same reason and, therefore, to again remand these claims would merely further delay a final decision. Rather, claimant requests that the case go forward and the Board proceed with full consideration of this appeal.

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,

⁴ The requirement that the Department of Labor provide a complete pulmonary evaluation is mandated upon the filing a living miner's claim. 20 C.F.R. §725.406(c). There is no comparable requirement with the filing of a survivor's claim. However, because the adjudication of the miner's claim and the survivor's claim herein are significantly intertwined, the Director has requested that the denial of benefits in the survivor's claim also be vacated and the case remanded for reconsideration in light of the medical evidence developed on remand of the case to the district director. Director's Letter Brief at 4-5.

and in accordance with applicable law.⁵ 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).

Initially, we address claimant’s contention that the administrative law judge erred in failing to find that the district director’s “repeated failure to obtain the statutorily required complete and credible pulmonary evaluations in this case is sufficient to justify application of equitable estoppel against the Director and an award of benefits to [the miner] thereby.” Claimant’s Brief at 6. Claimant contends that since the initial complete pulmonary evaluation was obtained, the district director has had several opportunities to provide the statutorily mandated complete pulmonary evaluation prior to making a decision. Hence, she argues that the Director, due to affirmative misconduct, failed to fulfill the statutory obligation to provide a complete and credible pulmonary evaluation and the administrative law judge erred in not applying the doctrine of equitable estoppel against the Director and award benefits.

We disagree. In order to establish the applicability of the doctrine of equitable estoppel against the Department of Labor (DOL), the party asserting estoppel must prove, in addition to the traditional elements of estoppel, affirmative misconduct on the part of DOL. *Reich v. The Youghioghney and Ohio Coal Co.*, 66 F.3d 111, 19 BLR 2-345 (6th Cir. 1995)(an employer must show affirmative misconduct by the government in order to assert the doctrine of equitable estoppel against the Department of Labor); *see Vahalik v. Youghioghney & Ohio Coal Co.*, 15 BLR 1-43 (1991); *see also Mukherjee v. I.N.S.*, 793 F.2d 1006 (9th Cir. 1986). Mere negligence, or error, is insufficient to establish affirmative misconduct. *Reich*, 66 F.3d at 116, 19 BLR at 2-351. In this case, claimant merely sets forth general allegations of affirmative misconduct on the part of DOL, based on the inability of the district director to obtain a complete and credible pulmonary evaluation from the miner’s physicians. Claimant, however, does not set forth a specific argument that the actions of the district director rise to the level of affirmative misconduct and are not mere negligent actions on the part of DOL. *Reich*, 66 F.3d at 116, 19 BLR at 2-351; *see also Mukherjee*, 793 F.2d at 1008. Specifically, while highlighting the several attempts to obtain a complete and credible pulmonary evaluation from the miner’s physicians, claimant has not established that the failure to satisfy the requirement of a complete pulmonary evaluation was the result of an affirmative act, or affirmative misconduct on the part of DOL. Moreover, as the Director argues, in requesting that the Board vacate the current denial of benefits and remand the miner’s claim for an additional medical opinion addressing the deficiencies in the prior opinions,

⁵ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant’s last coal mine employment was in Tennessee. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 2.

he is attempting to rectify the flaws identified by claimant. Director's Letter Brief at 4 n.2. Consequently, because the Director has taken the necessary steps to remedy the failure of DOL to obtain a complete pulmonary evaluation in the prior remand of the miner's claim, and claimant's allegations are not sufficient to establish that the actions on the part of DOL rise to the level of affirmative misconduct, we reject claimant's contention that the doctrine of equitable estoppel forecloses further adjudication of the miner's claim and requires payment of benefits.

We vacate the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim in light of the Director's Motion to Remand for further evidentiary development of the record in order to satisfy the Director's statutory duty pursuant to Section 413(b). Specifically, the Director states that the administrative law judge denied benefits, finding that neither the medical opinion of Dr. Patton nor Dr. Rodrigues clarified the issue of the cause of the miner's total disability and, therefore, found that claimant failed to establish that the miner's total disability was due to pneumoconiosis. Director's Letter Brief at 3. Similarly, the Director states that the administrative law judge found that Dr. Patton's opinion as to the cause of the miner's death was unsupported by reasoning or documentation. Director's Letter Brief at 3-4. In light of the administrative law judge's findings, the Director concedes that he "failed to provide a medical opinion that credibly addressed total disability and disability causation" and, thus, failed to satisfy his obligation under Section 413 (b). Director's Letter Brief at 4. Therefore, the Director requests that this case be remanded to the district director for additional medical development, specifically so that the Director can satisfy his obligation by having a physician review the evidence of record and address the issues of total disability and total disability causation. *Id.*

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*; 14 BLR 1-98 (1990).

Because the Director concedes that the opinions of Drs. Patton and Rodrigues do not credibly address the issues of total disability and total disability causation and, therefore, do not satisfy his statutory obligation, we grant the Director's motion and remand this case to the district director for further development of the evidentiary record so as to provide claimant with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Cline v. Director, OWCP*, 972

F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman*, 745 F.2d at 1166, 7 BLR at 2-31; *Hodges*, 18 BLR at 1-90; *Petry*; 14 BLR at 1-100. Consequently, we vacate the administrative law judge's findings under Sections 718.204 and 718.205(c), and the denial of benefits in both claims.

In the interest of administrative efficiency and to avoid repetition of error on remand, we will address claimant's contentions regarding the administrative law judge's consideration of the evidence at Section 718.204(c). The administrative law judge, in reviewing the medical evidence of record, initially set forth Judge Jansen's findings from the 2002 Decision and Order and stated that he agreed with Judge Jansen's weighing of the evidence and conclusions. Decision and Order at 7-8. In weighing the evidence submitted in response to the Board's remand, the administrative law judge found that Dr. Patton opined that the miner was totally disabled but did not state whether that disability was due to pneumoconiosis.⁶ Decision and Order at 9; Director's Exhibits 49, 64. The administrative law judge found that Dr. Rodrigues's most recent medical opinion was entitled to little weight because there is "no evidence indicating Dr. Rodrigues examined the miner at any time or conducted any objective test relating to the miner's pulmonary condition." Decision and Order at 9; Director's Exhibits 50, 63. Consequently, the administrative law judge accorded these opinions little weight on the issue of the cause of the miner's total disability and, therefore, found that claimant failed to establish that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order at 9.

Claimant contends that the administrative law judge erred in finding that Dr. Rodrigues's opinion was not reasoned and documented, arguing that Dr. Rodrigues indicated that his opinion was based upon patient history, a chest x-ray and pulmonary function testing, and that additional testing was done at Lake Cumberland Regional Hospital. Claimant's Brief at 8. Claimant also argues that the records show extensive testing by Dr. Rodrigues in July 2000. *Id.* Claimant also contends that the opinions of Drs. Patton and Rodrigues are entitled to "special weight" because they were the miner's treating physicians. *Id.* at 10-11. There is some merit to claimant's contentions.

A review of the record indicates that Dr. Rodrigues examined the miner on July 7, 2000, and that the examination included pulmonary function studies and blood gas studies. Director's Exhibits 28, 30, 50, 63. In addition, the record indicates that Dr. Rodrigues ordered follow-up testing, including CT scans in August 2000 and May 2001. *Id.* However, the administrative law judge restricted his consideration of the evidence to

⁶ The administrative law judge found that Dr. Patton stated only that he "could not say that cigarette smoking was non-contributory." Decision and Order at 9; Director's Exhibits 49, 64.

the evidence developed after the Board's 2003 Decision and Order remanding the miner's claim. Decision and Order at 9. Because the Board did not address the merits of Judge Jansen's findings, but rather vacated his Decision and Order, the administrative law judge herein, on remand, must consider all of the evidence submitted since the 1994 denial of benefits in order to determine whether claimant has established a material change in conditions. 20 C.F.R. §725.309(d) (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Moreover, because the original and supplemental medical opinions of Drs. Patton and Rodrigues may be considered in conjunction with one another in order to determine the credibility of the physicians' conclusions, the administrative law judge should consider the entirety of these reports. See *Hunley v. Director, OWCP*, 8 BLR 1-323, 1-326 (1985). However, contrary to claimant's contention, the administrative law judge is not permitted to mechanically accord determinative weight to the opinions of Drs. Patton and Rodrigues, based solely on their status as the miner's treating physicians, even when the record contains no contradictory evidence. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); see generally 20 C.F.R. §718.104(d)(5). The court stated that the opinions of treating physicians "get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647. Consequently, the administrative law judge must reconsider the issue of total disability causation based upon a weighing of all of the relevant evidence, with claimant bearing the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. See generally *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Trent*, 11 BLR at 1-27; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated, and this case is remanded to the district director for further evidentiary development consistent with this opinion, and for reconsideration of these claims in light of the new evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge