BRB No. 08-0649 BLA

S.S. o/b/o J.S. (deceased)	)	
Claimant-Petitioner	)	
v.	)	
BLUE SPRINGS COAL COMPANY	)	
	)	DATE ISSUED: 05/29/2009
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 on Modification – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.S., Chapmanville, West Virginia, *pro se*.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order on

[1] Claimant is the widow of the miner, J.S., who died on September 5, 2002. Director's Exhibit 15. Claimant filed a separate survivor's claim on October 17, 2002, the denial of which was affirmed by the Board on March 30, 2006. [*S.S.*] *v. Blue Springs*

Modification – Denying Benefits (2007-BLA-05348) of Administrative Law Judge Richard A. Morgan rendered on a miner'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). This case involves a request for modification dated November 22, 2002,[2] of the denial of the miner's January 25, 2000 duplicate claim.[3] Adjudicating this

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Coal Co., BRB No. 05-0659 BLA (Mar. 30, 2006)(unpub.); ALJ Exhibit 2. The survivor's claim is no longer at issue.

[2] In conjunction with the adjudication of the survivor's claim, the Board noted that the November 22, 2002 Request for Modification in the miner's claim had not been addressed. The Board stated that if claimant still sought modification in the miner's claim, she must do so before the district director. [*S.S.*] *v. Blue Springs Coal Co.*, BRB No. 05-0659 BLA, slip op. at 2 n.1 (Mar. 30, 2006)(unpub.); ALJ Exhibit 2. Claimant therefore resubmitted the Petition for Modification with the district director on May 2, 2006. Director's Exhibit 35. The request for modification is the claim currently before the Board.

[3] The miner filed his first claim for benefits with the Social Security Administration (SSA) on February 22, 1973, which was denied by SSA on April 18, 1979. Director's Exhibit 1. The claim was transferred to the Department of Labor (DOL), which denied the claim on August 22, 1980. *Id*. The miner filed an application with DOL on May 17, 1984, which was denied on January 17, 1985, based on the district director's finding that the miner failed to establish any of the essential elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 2. The miner filed a third application for benefits on January 18, 1986, which was denied by Administrative Law Judge David Clarke, Jr. in a Decision and Order issued on August 2, 1990. Director's Exhibit 3. A fourth application for benefits was filed by the miner on July 28, 1997, which was denied by the district director in an Order dated December 29, 1997, based on the determination that the evidence did not establish disability causation and, therefore, a material change in conditions was not establish under 20 C.F.R. §725.309 (2000). By letter dated March 17, 1998, the district director stated that this claim was finally denied by reason of abandonment because the miner did not submit additional evidence or request a hearing after the December 29, 1997 denial. Director's Exhibit 4.

The miner filed his fifth, and current, application for benefits on January 25, 2000, which was initially awarded by the district director. Director's Exhibit 5. Following employer's request for a hearing, the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Richard A. Morgan (the administrative law judge). In a Decision and Order issued on November 20, 2001, the administrative law judge denied benefits, based on his determination that the evidence

claim pursuant to 20 C.F.R. Part 718, the administrative law judge considered the evidence submitted since the November 20, 2001 denial of benefits, and found the new autopsy evidence and medical opinion evidence sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (4), and, thus, found the evidence sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[4] requiring that he modify his prior decision. In addition, the administrative law judge found the evidence sufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Noting that he previously found the evidence sufficient to establish total respiratory disability, the administrative law judge stated that claimant must establish that the miner's total disability was due to pneumoconiosis. Weighing the old and new evidence, the administrative law judge found that the weight of medical evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not submit a substantive

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was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or disability causation pursuant to 20 C.F.R. §718.204(c). *Id*. Claimant appealed to the Board. While the case was before the Board, the miner died and claimant submitted a letter dated October 18, 2002 stating that she was pursuing the miner's pending claim on his behalf. In addition, on November 22, 2002, claimant filed a Request for Modification with the district director. *Id.* However, the Board retained jurisdiction of the claim and in a Decision and Order dated December 16, 2002, affirmed the administrative law judge's denial of benefits, based on its affirmance of his finding that the medical evidence was insufficient to establish disability causation at Section 718.204(c). [*S.S.*] *v. Blue Springs Coal Co.*, BRB No. 02-0258 BLA/A (Dec. 16, 2002)(unpub.); Director's Exhibit 5. Claimant filed a Motion for Reconsideration on December 26, 2002, which the Board denied by Order dated March 19, 2003. [*S.S.*] *v. Blue Springs Coal Co.*, BRB No. 02-0258 BLA/A (Mar. 19, 2003)(unpub.)(Order); Director's Exhibit 5.

[4] 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. The amendments to the regulations at 20 C.F.R. §725.310 do not apply to claims, such as this, that were pending on January 19, 2001. See 20 C.F.R. §725.2.

brief unless requested to do so by the Board.[5]

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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.[6] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that his finding, that the medical opinion evidence as a whole is insufficient to establish entitlement to benefits, is supported by substantial evidence and contains no error requiring remand or reversal. Specifically, we affirm the administrative law judge's finding that, in considering the evidence as a whole, claimant failed to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c).

In considering the issue of disability causation, the administrative law judge

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[5] The parties do not challenge the administrative law judge's findings that the autopsy evidence and medical opinion evidence are sufficient to establish the existence of simple coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (4), his finding that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), or his finding that this evidence established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Because these findings are not adverse to claimant, they are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mining employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 5, 8.

initially found that the medical opinions of Drs. Zaldivar, Fino, Jarboe and Castle, which were submitted by employer in conjunction with the miner's January 25, 2000 claim, were entitled to no weight because the physicians believed that the miner did not have pneumoconiosis. The administrative law judge noted that these physicians' opinions on the issue of disability causation were undermined by the subsequent autopsy evidence and more recent medical opinions diagnosing the existence of pneumoconiosis. Decision and Order at 7; Director's Exhibit 5. Because the administrative law judge acted within his discretion in rejecting these opinions, we affirm his conclusion that the newer evidence is the most probative as to whether the miner was totally disabled by pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004).

The administrative law judge then found that Dr. Jelic, in the autopsy report, diagnosed the presence of complicated pneumoconiosis. Decision and Order at 16; Director's Exhibit 17. However, the administrative law judge found that Drs. Oesterling and Bush, both of whom are Board-certified in Pathology, diagnosed only the presence of simple pneumoconiosis, based on their review of the autopsy slides. Decision and Order at 16; Employer's Exhibits 1, 2. In addition, the administrative law judge found that the opinions of Drs. Oesterling and Bush are supported by the consultative opinions of Drs. Zaldivar, Jarboe and Spagnolo, who are Board-certified pulmonary specialists, as well as the earlier opinions of Drs. Walker and Rasmussen.[7] Decision and Order at 16; Director's Exhibit 5; Employer's Exhibits 3-6. Noting that Dr. Jelic's professional qualifications are not in the record, the administrative law judge reasonably exercised his discretion in finding that the weight of the medical evidence by the physicians with superior professional qualifications, is insufficient to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304; *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc); s*ee Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); Decision and Order at 16. As the administrative law judge

[7] The administrative law judge found that Dr. Walker's professional credentials are not in the record. With regard to Dr. Rasmussen, the administrative law judge found that while Dr. Rasmussen is not a Board-certified pulmonary specialist, his credentials are comparable. Specifically, the administrative law judge noted that Dr. Rasmussen's curriculum vitae shows that he has extensive experience in the field of pulmonary medicine and had testified before subcommittees of the United States Senate and House of Representatives and the West Virginia legislature several times on the issue of coal workers' pneumoconiosis. Decision and Order at 8, 16.

considered the relevant evidence and rationally found that the weight of the evidence is insufficient to establish complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis and, therefore, is not entitled to the benefit of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304.[8] 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-34.

Claimant must, therefore, establish disability causation by a preponderance of the medical evidence. Pursuant to Section 718.204(c), the administrative law judge considered the medical opinions of Drs. Walker and Rasmussen, that the miner's total disability was due to his pneumoconiosis, and the contrary opinions of Drs. Oesterling, Bush, Zaldivar, Jarboe and Spagnolo, that the miner's pneumoconiosis was too mild to have contributed to his total respiratory disability. Weighing these medical opinions, the administrative law judge reasonably accorded little weight to Dr. Walker's opinion, finding that his analysis of the disability causation issue was "cursory, at best," because Dr. Walker did not provide any analysis regarding the extent that pneumoconiosis may have contributed to the miner's total disability. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 7-8, 17. The administrative law judge also found that Dr. Walker's opinion was entitled to little weight because it was limited to the data he obtained in February 2000 and did not include any of the more recent evidence, such as the results of the miner's autopsy. *Id*.

With regard to Dr. Rasmussen's opinion: that the miner's "progressively disabling lung disease is at least as likely to be the consequence of his earlier coal mine dust exposure as to be a new, or yet speculative lung disorder," the administrative law judge found that this opinion would be sufficient to establish disability causation, if it were determinative. Decision and Order at 17; Director's Exhibit 5. However, the administrative law judge found that it was outweighed by the contrary opinions of Drs. Oesterling, Bush, Zaldivar, Jarboe and Spagnolo, that the miner's pneumoconiosis was of such a limited degree that it did not contribute to his pulmonary disability. Specifically, the administrative law judge found these opinions were well-reasoned and documented and entitled to greater weight than Dr. Rasmussen's opinion because, unlike Dr. Rasmussen's opinion, dated July 27, 2001, these opinions took into consideration the more recent medical evidence, specifically the miner's autopsy results. Decision and

[8] The administrative law judge also noted that, at the hearing, claimant's counsel stated that claimant was no longer contesting the issue of complicated pneumoconiosis. Decision and Order at 16; Hearing Transcript at 12.

Order at 8-16, 17; Director's Exhibit 5; Employer's Exhibits 1-6. Consequently, the administrative law judge reasonably accorded determinative weight to the contrary opinions of Drs. Oesterling, Bush, Zaldivar, Jarboe and Spagnolo, that do not support a finding that the miner's pneumoconiosis was a substantially contributing cause of his total respiratory disability, based on his finding that these opinions were better reasoned and documented, and that their conclusions are better explained in light of the underlying documentation, than are the opinions of Drs. Rasmussen and Walker. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *Clark*, 12 BLR at 1-155; Decision and Order at 17. The administrative law judge reasonably found that these opinions outweighed the causation opinions from claimant's experts, because these opinions are better reasoned and documented. *Id*.

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 Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's pneumoconiosis was a substantially contributing cause of his total respiratory disability pursuant to Section 718.204(c), as it is supported by substantial evidence.

Since claimant has not established that the miner's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c), a requisite element of entitlement under Part 718, an award of benefits is precluded. *Akers*, 131 F.3d at 441, 21 BLR at 2-275; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order on Modification – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge