BRB No. 99-1238 BLA

RUTH ENDICOTT (Widow of AUXIER ENDICOTT) Claimant-Respondent	)	
v.	)	DATE ISSUED:
MARTIKI COAL CORPORATION 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 Award of Benefits for Miner and Survivor of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Jeffrey Hinkle (Anderson, Hinkle, Keenan and Childers, P.S.C.), Inez, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits for Miner and Survivor (99-BLA-0357) of Administrative Law Judge Thomas F. Phalen, Jr. on claims 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 duplicate living miner's claim filed on June 28, 1995, and a survivor's claim filed on May 8, 1998, which the administrative law judge considered under the applicable regulations at 20 C.F.R. Part 718.

[1]The miner filed an initial claim for benefits on December 10, 1985, which the district director denied on March 13, 1986. Director's Exhibit 53. The miner filed a duplicate miner's claim on November 6, 1987. *Id*. In a Decision and Order dated April 2, 1994, Administrative Law

In his Decision and Order, the administrative law judge credited the miner with ten years of coal mine employment based upon the stipulation of the parties. With regard to the duplicate miner's claim, the administrative law judge found the newly and previously submitted x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further determined that the miner's pneumoconiosis arose out of his coal mine employment in accordance with the rebuttable presumption provisions of 20 C.F.R. §718.203(b). In addition, the administrative law judge found that the evidence of record was sufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge found claimant entitled to benefits on the miner's claim. With regard to the survivor's claim, the administrative law judge found the evidence of record sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge awarded survivor's benefits. On appeal, employer challenges the administrative law judge's findings under Sections 718.202(a)(1), 718.203(b), 718.204(b) and 718.205(c). Claimant responds in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not intend presently to participate in 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, and 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).

Judge Peter McC. Giesey found that the miner established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), and pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203. *Id*. Judge Giesey further found, however, that claimant failed to establish total disability under 20 C.F.R. §718.204(c) and, accordingly, denied benefits. *Id*. The miner appealed. The Board affirmed Judge Giesey's finding that total disability was not established under Section 718.204(c) and, consequently, affirmed the denial of benefits, holding that it was unnecessary to address Judge Giesey's finding under Section 718.202(a)(1) and failure to consider whether a material change in conditions was established under 20 C.F.R. §725.309. *Endicott v. Martiki Coal Co.*, BRB No. 92-1508 BLA (Sept. 20, 1993)(unpublished). The miner thereafter did not take further action until filing the instant duplicate miner's claim on June 28, 1995. Director's Exhibit 1. While the claim was pending before the Office of Administrative Law Judges, the miner died on February 6, 1998. In an Order dated March 2, 1998, Administrative Law Judge Daniel J. Roketenetz remanded the miner's claim to the district director for the purpose of allowing Mrs. Endicott to be substituted as claimant in the miner's claim, and for the miner's claim to be consolidated with a survivor's claim which claimant indicated she would be filing. Director's Exhibit 54. Claimant filed her survivor's claim on May 8, 1998. *Id*.

[2]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, and the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 18-22.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant, in this claim, must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The case at bar arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In challenging the administrative law judge's finding that the x-ray evidence was sufficient to establish that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(1), employer contends that the administrative law judge erred in relying upon the positive x-ray interpretations of Drs. Myers, Baker, Barrett and Younes, who are B readers and/or Board-certified radiologists, because he failed to consider the fact that Drs. Branscomb, Fino, Broudy, Scott, Wheeler, Spitz, Wiot, Poulos, Halbert and Sargent, all of whom are likewise B readers and/or Board-certified radiologists, submitted negative x-ray interpretations. Employer's contention has merit. While the administrative law judge noted when summarizing the medical evidence that the negative interpretations to which employer refers were contained in the record, Decision and Order at 4-6, the administrative law judge did not explain why he found these several interpretations outweighed by the positive interpretations of Drs. Myers, Baker, Barrett and Younes. In attempting to resolve the conflict in the evidence under Section 718.2.202(a)(1), the administrative law judge stated:

I find that the numerous readings of chronic pulmonary disease considered in

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[3]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

> conjunction with the positive chest x-ray interpretations from qualified radiologists support the prior decisions finding the existence of pneumoconiosis. Drs. Myers, Baker, Barrett and Younes read the x-ray films as positive for pneumoconiosis. Dr. Barrett is a "B" reader and Board certified radiologist, and Drs. Younes and Baker are "B" readers. Accordingly, I find that the chest x-ray evidence by a preponderance of the evidence proves that [the miner] had pneumoconiosis.

Decision and Order at 18. In reaching this conclusion, the administrative law judge thus appears neither to have weighed the negative interpretations submitted by employer's experts, nor to have provided a sufficient rationale for discounting them. *Id*. Where the administrative law judge rejects relevant medical evidence without adequately explaining a reason for doing so, the Board will remand the case for reconsideration of the relevant evidence. *See Brewster v. Director, OWCP*, 7 BLR 1-120 (1984). We vacate the administrative law judge's finding that claimant established that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(1), and remand the case for the administrative law judge to consider all of the relevant evidence thereunder, and to provide a sufficient rationale for crediting or rejecting the evidence. If on remand, the administrative law judge determines that the x-ray evidence is not sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), he must then address whether this element of entitlement is established under Section 718.202(a)(2)-(4).

Inasmuch as we have vacated the administrative law judge's finding that the miner suffered from pneumoconiosis, we vacate the administrative law judge's findings that the miner established pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b), as well as the administrative law judge's findings that the miner's total disability and death were due to pneumoconiosis pursuant to Sections 718.204(b) and 718.205(c). In vacating the administrative law judge's findings, we note that employer's contention that the administrative law judge failed to consider the relative qualifications of the physicians when weighing the relevant evidence thereunder appears to have merit. On remand, the administrative law judge is not required to defer to the opinion of any physician based solely upon the physician's qualifications, but the administrative law judge must consider this factor in weighing the evidence. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55,

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[4]In this case, the miner had sought modification of the denial of benefits *by the district director* in the instant duplicate claim, Director's Exhibit 33, and it is thus not necessary for the administrative law judge to make a specific preliminary finding regarding the grounds for modification under 20 C.F.R. §725.310, a finding which the administrative law judge stated at one point in his Decision and Order he would render. *See Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); Decision and Order at 16-17. We note, however, that the miner's claim is subject to automatic denial unless claimant establishes a material change in conditions since the previous denial of benefits. *See* 20 C.F.R. §725.309. In this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge must determine initially whether the newly submitted evidence is sufficient to establish any one of the elements of entitlement which was decided against the miner in the previous claim. *See Sharondale v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Finally, we reject employer's assertion that the administrative law judge was biased against its case. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence inasmuch as this is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107-108 (1992). A review of the record reveals no evidence of bias on the administrative law judge's part.

Accordingly, the administrative law judge's Decision and Order Award of Benefits for Miner and Survivor is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge