

BRB No. 08-0195 BLA

L.C.T.)
(On behalf of and Widow of R.W.T.))
)
Claimant-Respondent)
)
v.)
)
MAPLE MEADOW MINING COMPANY) DATE ISSUED: 11/25/2008
)
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 on Remand – Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Renaë Reed Patrick (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2004-BLA-0121 and 2004-BLA-6356) of Administrative Law Judge Richard A. Morgan rendered on a miner's claim¹ and a survivor's claim filed pursuant to the provisions of

¹ Claimant is the widow of the miner, whose claim for benefits was pending at the time of his death on April 26, 2003. Director's Exhibit 56. The miner filed his claim on

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 is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Gerald M. Tierney credited claimant with at least thirty-four years of coal mine employment, and adjudicated both claims pursuant to the regulations at 20 C.F.R. Part 718. After accepting the parties' stipulation that the miner had clinical pneumoconiosis and some form of chronic obstructive pulmonary disease, the administrative law judge also found that the evidence was sufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b); that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c); and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded in both claims.

On appeal, the Board affirmed the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414, and his finding of total respiratory disability at Section 718.204(b)(2), but vacated his finding of legal pneumoconiosis pursuant to Sections 718.201(a)(2), 718.202(a)(4), and his findings of disability causation at Section 718.204(c) and death causation at Section 718.205(c). The case was remanded for the administrative law judge to reassess the conflicting medical opinions and fully articulate the rationale and underlying support for his credibility determinations and findings of fact, including the administrative law judge's finding that the opinions of Drs. Naeye, Rosenberg, Tomashefski, Fino and Bush were hostile to the Act. The Board further held that the administrative law judge incorrectly equated the assessment of employer's experts, that the amount of pneumoconiosis seen on the autopsy slides encompassed 1-5% of the lung tissue, with a 1-5% loss of lung function. The administrative law judge was instructed to provide an analysis that comports with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). [*L.C.T.*] *v. Maple Meadow Mining Co.*, BRB No. 05-0972 BLA (Sept. 29, 2006)(unpub.).

On remand, Administrative Law Judge Richard A. Morgan² reviewed the entire record, and found that the medical opinions of Drs. Naeye, Rosenberg, Tomashefski, Fino and Bush were not hostile to the Act. In accordance with the Board's instructions, the administrative law judge reevaluated the opinions of Drs. Naeye, Tomashefski, Bush

June 1, 2000. Director's Exhibit 2. Claimant filed her survivor's claim on June 26, 2003. Director's Exhibit 52.

² Due to the retirement of Administrative Law Judge Gerald M. Tierney, the case was assigned to Administrative Law Judge Richard A. Morgan. Decision and Order on Remand at 2.

and Caffrey with the understanding that that they did not cite a 1-5% loss of lung function. The administrative law judge found that the weight of the evidence was sufficient to establish legal pneumoconiosis pursuant to Sections 718.201(a)(2), 718.202(a)(4), as well as disability causation pursuant to Section 718.204(c) and death due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were awarded in both claims.

In the present appeal, employer challenges the administrative law judge's findings of legal pneumoconiosis and disability causation, as well as his finding that pneumoconiosis contributed to the miner's death. Claimant responds, urging affirmance of the award of benefits. Employer replies in support of its position. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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.³ 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 initially contends that the administrative law judge erred in finding the existence of legal pneumoconiosis established at Sections 718.201(a)(2) and 718.202(a)(4). Employer alleges that the administrative law judge's Decision and Order does not comport with the requirements of the APA, because the administrative law judge failed to provide a valid explanation of how the opinions of claimant's physicians were better supported than the opinions of employer's physicians, and the administrative law judge discredited several physicians' assessments without explanation. Employer's arguments have merit.

In evaluating the evidence on the issue of legal pneumoconiosis, the administrative law judge accorded the opinion of Dr. Naeye less weight, as he found that the physician failed to adequately explain why coal dust exposure did not play a role in any of the miner's multiple pulmonary conditions. Decision and Order on Remand at 5. The administrative law judge also accorded the opinion of Dr. Fino less weight, because he found that the doctor did not consider the medical evidence developed after the miner was diagnosed with lung cancer, and thus did not consider whether coal dust exposure played a role in the subsequent development of the miner's totally disabling pulmonary

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2, 53.

impairment and/or death. Decision and Order on Remand at 6. The administrative law judge determined that the opinions of Drs. Rosenberg, Tomashefski, and Bush were well reasoned, Decision and Order on Remand at 5-6, but found that the opinions of Drs. Perper and Koenig, as buttressed by those of Drs. Gaziano, McMillan, and the Occupational Pneumoconiosis Board, were “more consistent with the miner’s employment and smoking histories, his treatment records, the miner’s subjective complaints, and the clinical data,” and thus were entitled to greater weight than the contrary opinions of Drs. Naeye, Rosenberg, Tomashefski, Fino and Bush, as buttressed by those of Drs. Castle, Crisalli, Caffrey, and Spagnolo. Decision and Order on Remand at 7. In making this determination, the administrative law judge explained that:

The pro-Claimant physicians cited the combined effects of smoking and coal mine dust inhalation as the cause of the miner’s pulmonary impairment. This is consistent with the miner’s extensive smoking and coal mine employment histories. In contrast, the pro-Employer physicians found that the miner’s pulmonary impairment, if any, was unrelated to the miner’s lengthy coal mine employment history. Furthermore, the treatment records establish that the miner was diagnosed with pneumoconiosis and that he suffered from some degree of pulmonary or respiratory impairment long before he was diagnosed with lung cancer. In addition, the clinical data establishes that the miner had some degree of pulmonary impairment many years prior to his death, which significantly worsened after the miner developed metastatic lung cancer.... Moreover, the autopsy evidence clearly establishes that the miner suffered from clinical pneumoconiosis. This, in turn, supports the opinions of those physicians who had diagnosed pneumoconiosis during the miner’s lifetime.

Decision and Order at 8. Contrary to the administrative law judge’s findings, however, a lengthy coal mine employment history does not conclusively establish that the miner’s pulmonary impairment was attributable to coal dust exposure. *Cf. Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Similarly, as employer’s experts also found some degree of pulmonary or respiratory impairment prior to the miner’s diagnosis of lung cancer, but attributed the impairment to smoking rather than coal dust exposure, the administrative law judge failed to sufficiently articulate how the treatment records and clinical data support his reliance on the opinions of the experts supportive of claimant’s case rather than those of employer’s physicians. *See Webber v. Peabody Coal Co.*, 23 BLR 1-127 (2006)(*en banc*)(Boggs, J., concurring). Furthermore, while simple coal workers’ pneumoconiosis was found on autopsy and acknowledged by employer’s experts, the mere presence of clinical pneumoconiosis does not necessarily result in a compensable impairment. *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990), *aff’d*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

As the administrative law judge provided an insufficient rationale for his findings of fact, his Decision and Order on Remand does not comport with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, we vacate the administrative law judge's findings at Sections 718.201(a)(2), 718.202(a)(4), and remand this case for the administrative law judge to address all relevant evidence, assign the evidence appropriate weight, and provide valid reasons for each of his credibility determinations, while clearly explaining his rationale as to each medical expert.

As the administrative law judge's findings on the issue of legal pneumoconiosis affected his weighing of the evidence on the issues of disability causation and the cause of the miner's death, Decision and Order on Remand at 8-10, we also vacate his findings at Sections 718.204(c) and 718.205(c) for a reassessment of the conflicting evidence thereunder on remand.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits on both claims is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge