BRB No. 13-0062 BLA

MAXINE HUDSON (Widow of CHARLES W. HUDSON) Claimant-Petitioner v. PEABODY COAL COMPANY and PEABODY INVESTMENTS, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/14/2013 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (2009-BLA-5493) of Administrative Law Judge Richard A. Morgan rendered on a survivor's

claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the second time. In the last appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the miner had more than forty-four years of underground coal mine employment, and his determination that the pulmonary function study and arterial blood gas study evidence was insufficient to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii) (2013). The Board, however, vacated the administrative law judge's findings that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2) (2013), and that claimant failed to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] because the administrative law judge conflated his consideration of the issues of total respiratory disability and disability causation, rather than addressing these two distinct elements of entitlement separately. Thus, the Board remanded this case for the administrative law judge to consider whether the medical opinion evidence was sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) (2013) and, if so, to weigh it against the contrary probative evidence at Section 718.204(b) (2013). The Board instructed the administrative law judge that if, on remand, total respiratory disability was established, claimant would be entitled to invocation of the amended Section 411(c)(4) presumption, and the burden would shift to employer to establish rebuttal of the presumption. *Hudson v. Peabody Coal Co.*, BRB No. 11-0177 BLA (Oct. 11, 2011)(unpub.).

[1] Claimant, Maxine Hudson, is the widow of the miner, who died on June 2, 2008. Claimant filed a survivor's claim for benefits on July 10, 2008. Director's Exhibit 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if the claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

On remand, the administrative law judge found that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2) (2013) and that, therefore, claimant was not entitled to invocation of the presumption at amended Section 411(c)(4). The administrative law judge further found that the evidence was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) (2013), but insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the medical opinion evidence at Section 718.204(b)(2)(iv) (2013) in finding that total respiratory disability was not established, and that claimant was not entitled to invocation of the amended Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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.[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).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, that the miner suffered from complicated pneumoconiosis, or that the presumption at 20 C.F.R. §718.305 is invoked and not rebutted. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203 (2013), 718.205, 718.304 (2013), 718.305; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(6); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

Claimant asserts that the evidence of record is sufficient to establish total respiratory disability at Section 718.204(b) (2013) and invocation of the amended Section 411(c)(4) presumption of death due to pneumoconiosis, but insufficient to establish rebuttal of the presumption. Specifically, claimant challenges the administrative law judge's weighing of the evidence at Section 718.204(b)(2)(iv) (2013), contending that the administrative law judge erred in crediting the opinions of Drs. Rosenberg and Zaldivar, that the miner did not suffer a totally disabling respiratory impairment, over the contrary opinion of Dr. Cohen, as buttressed by the hospital records and the opinion of Dr. Pfister, the miner's treating physician. Claimant avers that, while the administrative law judge found simple pneumoconiosis established, Dr. Cohen's diagnosis of complicated pneumoconiosis did not affect his reasoned assessment of total respiratory disability. Claimant maintains that the opinions of Drs. Rosenberg and Zaldivar are suspect because they were obtained on behalf of employer, and because both physicians admitted that their assessments were "based upon a record which is silent between 2004 and [the miner's] hospitalization(s) in 2008." Claimant's Brief at 3 [unpaginated]. Claimant also argues that Dr. Rosenberg's testimony, that simple pneumoconiosis is generally not disabling, renders his opinion hostile to the Act. Claimant's arguments are tantamount to a request for the Board to reweigh the evidence, which exceeds the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

After noting that all of the pulmonary function studies and arterial blood gas studies of record produced non-qualifying values at Section 718.204(b)(2)(i), (ii) (2013), the administrative law judge reviewed the underlying bases for the physicians' opinions at Section 718.204(b)(2)(iv) (2013). The administrative law judge determined that Dr. Cohen's August 3, 2004 report, while indicating that the disability evaluation of an elderly person such as the miner was "extremely difficult," concluded that the miner's most recent exercise study showed significant gas exchange abnormalities which, coupled with his mild obstructive and restrictive impairment, disabled him from performing his usual coal mine employment. Decision and Order on Remand at 3; Claimant's Exhibit 8. However, as Dr. Cohen stated during his deposition on July 16, 2010, the 2004 arterial blood gas study was the most recent one he saw. The administrative law judge determined that Dr. Cohen "was neither asked nor did he explicitly discuss whether the 2008 records [containing three arterial blood gas studies] showed that the miner's respiratory or pulmonary condition prevented the miner from . . . performing his usual coal mine work or comparable or gainful work." Thus, the administrative law judge permissibly concluded that Dr. Cohen's opinion was "less persuasive."[4] *See Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67

[4] We reject claimant's assertion that the administrative law judge improperly relied on Dr. Cohen's incorrect diagnosis of complicated pneumoconiosis as an additional basis to reject his assessment of total disability. The administrative law judge discounted Dr. Cohen's diagnosis of complicated pneumoconiosis on the ground that it was contrary

(4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); Decision and Order on Remand at 4; Claimant's Exhibit 11. By contrast, the administrative law judge determined that the opinions of Drs. Rosenberg and Zaldivar,[5] that the miner had no significant respiratory or pulmonary impairment/disability, but was debilitated by a combination of non-respiratory conditions, including advanced age, significant weight loss, pneumonia, and congestive heart failure from coronary artery disease, were supported by the non-qualifying objective tests, the miner's hospitalization records and the pathology findings. Decision and Order on Remand at 3-4; Director's Exhibit 10; Employer's Exhibits 17, 18. As Dr. Pfister, the miner's treating physician, did not explicitly address the issue of total respiratory disability, the administrative law judge acted within his discretion in finding that the opinion of Dr. Cohen failed to outweigh "the multiple and mutually-supportive opinions of the majority of physicians," that the miner did not suffer from a totally disabling respiratory impairment, which were "consistent with the non-qualifying objective tests and the hospital treatment records." Decision and Order on Remand at 4; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). As substantial evidence supports the administrative law judge's findings, we affirm his determination that the medical opinion evidence of record is insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv) (2013), and that the weight of the evidence as a whole is insufficient to establish total disability pursuant to Section 718.204(b) (2013). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the rebuttable presumption

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to the overwhelming majority of the relevant evidence, which included chest X-rays, digital X-rays, CT scans, hospitalization records, the opinion of the miner's treating physician, Dr. Pfister, the pathology opinions of Drs. Cinco and Oesterling, and the opinions of pulmonologists, Drs. Rosenberg and Zaldivar. Decision and Order on Remand at 3.

[5] We reject claimant's suggestion that the opinions of Drs. Rosenberg and Zaldivar should be discounted because they were obtained on behalf of employer, as claimant has not identified any evidence of bias. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Additionally, while the administrative law judge acknowledged that Dr. Rosenberg's statement, that simple pneumoconiosis is "rarely" associated with impairment unless a Category A pulmonary massive fibrosis is present, could be construed as hostile to the Act, he was not required to find that this factor undermined the overall reliability of Dr. Rosenberg's opinion on the issue of total respiratory disability. Decision and Order at 3 n.2; Employer's Exhibit 17.

that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Finally, because claimant has not identified any specific legal or factual errors in the administrative law judge's consideration of the evidence relevant to the cause of the miner's death, we affirm the administrative law judge's finding that the weight of the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *See* 20 C.F.R. §802.211(b) (2013); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Thus, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand 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