

BRB No. 03-0198 BLA

FLOYEDITH STILLS (Widow of )  
RAYMOND STILLS) )

Claimant-Petitioner )

v. )

DATE ISSUED: 10/16/2003

PEABODY COAL COMPANY )

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 - Denial of Benefits of Robert L. Hillyard,  
Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelly, P.S.C.), Madisonville, Kentucky, for  
claimant.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer.

Barry Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire,  
Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; and  
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  
GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2001-BLA-1052 and 2001-BLA 1053) of Administrative Law Judge Robert L. Hillyard denying benefits on a miner's duplicate claim and a survivor's claim 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).<sup>1</sup> The miner, Raymond C. Stills, filed his original claim for black lung benefits on August 7, 1989, which was denied by Administrative Law Judge Bernard J. Gilday, Jr., who found that the miner suffered from pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment, but that the impairment was not caused by pneumoconiosis, in a Decision and Order dated January 4, 1991. Decision and Order at 2; Director's Exhibit 49. The miner filed the instant claim, his second, on December 13, 1999. Subsequently, on August 9, 2000, while the claim was pending, the miner died. Decision and Order at 2; Director's Exhibits 1, 23. On September 1, 2000, the miner's widow, claimant herein, filed a survivor's claim. Decision and Order at 3; Director's Exhibit 22. Subsequently, both claims were consolidated and the case was referred to the Office of Administrative Law Judges. The administrative law judge credited the miner with thirty-six years of coal mine employment and adjudicated the miner's duplicate claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.

With regard to the miner's claim, the administrative law judge considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2) (2000),<sup>2</sup> the element of entitlement previously adjudicated against the miner. The administrative law judge thus found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).<sup>3</sup> Accordingly, benefits were denied in the miner's duplicate claim.

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<sup>1</sup> 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, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). Unless otherwise noted, all citations are to the amended regulations.

<sup>2</sup> The administrative law judge applied the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c).

<sup>3</sup> The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

With respect to the survivor's claim, the administrative law judge considered all of the evidence of record and found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on the survivor's claim.

On appeal, claimant contends that the administrative law judge erroneously relied on the opinions of Drs. Branscomb and Selby, while erroneously according diminished weight to the opinion of Dr. Simpao, in finding that total disability due to pneumoconiosis, as well as a material change in conditions, were not established pursuant to 20 C.F.R. §§718.204(c)(1) and 725.309(d) in the miner's duplicate claim. Claimant also contends that the administrative law judge erred in finding that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivor's claim. Claimant alternatively asserts that if the administrative law judge's credibility determination with respect to Dr. Simpao's opinion was proper, then the Department of Labor has not provided claimant with a complete and credible pulmonary evaluation as required by the Act. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging remand for the administrative law judge to reconsider the opinion of Dr. Simpao if the Board affirms the administrative law judge's credibility determination with respect thereto and, if necessary, to remand the case to the district director for the development of additional medical evidence.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction these claims arise, has held that in order to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of

entitlement previously adjudicated against the miner.<sup>4</sup> *Ross*, 42 F.3d 993, 19 BLR 2-10 If the miner establishes that element, he has demonstrated, as a matter of law, a material change. Then, the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Ross*, 42 F.3d 993, 19 BLR 2-10.

In the present case, the administrative law judge determined that the miner's previous claim was denied on the ground that the miner did not establish that he was totally disabled due to pneumoconiosis. Decision and Order at 17-19. The administrative law judge then properly reviewed all of the relevant evidence submitted subsequent to the date of the prior denial, which included only the medical opinions of Drs. Simpao, Selby and Branscomb, to determine whether claimant had proven the only element of entitlement previously adjudicated against the miner. Decision and Order at 19-21; *see Ross*, 42 F.3d 993, 19 BLR 2-10.

Pursuant to Section 718.204(c)(1), claimant contends that the administrative law judge erred by failing to find that claimant established that his pneumoconiosis contributed to his total disability, asserting that the administrative law judge improperly discredited the opinion of Dr. Simpao and improperly credited the opinion of Drs. Branscomb and Selby. Dr. Simpao diagnosed a totally disabling respiratory impairment due to coal dust exposure, while Drs. Branscomb and Selby attributed the miner's impairment to smoking. Director's Exhibits 10, 26; Employer's Exhibits 1-3. The administrative law judge found that Dr. Simpao did not explain how he arrived at his conclusion and failed to account for the effect of claimant's smoking on his respiratory impairment. Decision and Order at 21. As such, the administrative law judge acted within his discretion in finding Dr. Simpao's conclusion regarding causation inadequately explained, and, therefore, entitled to little weight. Thus, we affirm the administrative law judge's weighing of Dr. Simpao's opinion, and we need not address claimant's arguments with respect to the administrative law judge's consideration of the opinions of Drs. Selby and Branscomb. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *see generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mine industry in the State of West Virginia. *See Director's Exhibit 3, 4; Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *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). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant contends that the administrative law judge erred in failing to conclude that the opinion of Dr. Simpao, who attributed the miner's chronic obstructive pulmonary disease to coal mine employment, in conjunction with the death certificate indicating that chronic obstructive pulmonary disease contributed to the miner's death, established death due to pneumoconiosis.<sup>5</sup> We disagree. In his consideration of the evidence, the administrative law judge reasonably found that since there was no competent medical evidence which attributed the miner's death to pneumoconiosis, claimant failed to establish entitlement to survivor's benefits. *See Griffith* 49 F.3d 184, 19 BLR 2-111; *Trumbo*, 17 BLR 1-85. Decision and Order at 22-24. Consequently, we affirm the administrative law judge's finding that the medical evidence of record failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Lastly, the Director requests that this case be remanded to the district director for additional medical development, as the Director alleges that he failed to meet his statutory obligation to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Hall v. Director, OWCP*, 14 BLR 1-51(1990)(*en banc*); *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 administrative law judge rationally determined that Dr. Simpao, who evaluated claimant on behalf of the Department of Labor, did not provide a clear opinion on the cause of disability or death, *see* Decision and Order at 21, Director's Exhibit 10, the Director maintains that Dr. Simpao's opinion does not fulfill the requirements for a complete and credible pulmonary evaluation. Consequently, we vacate the administrative law judge's

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<sup>5</sup> The death certificate, signed by Dr. Lineberry, lists the causes of the miner's death as pneumonia due to chronic obstructive pulmonary disease along with coronary artery disease and history of prostate cancer. Decision and Order at 23; Director's Exhibit 23.

denial of benefits pursuant to the Director's request, and remand this case to the district director for further development of the evidence as specifically set forth in the Director's response brief.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and this case is remanded to the district director for further evidentiary development.

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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PETER A. GABAUER, Jr.  
Administrative Appeals Judge