BRB No. 01-0115 BLA

PHYLLIS MILLER (Widow of JENNINGS B. MILLER) Claimant-Petitioner v. EASTERN ASSOCIATED COAL CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-0261) of Administrative Law

[1] Claimant, Phyllis Miller, is the widow of the miner, Jennings B. Miller, and is pursuing both her own survivor's claim and the miner's claim. The miner filed his claim on October 13, 1998. Director's Exhibit 1. The miner died on June 12, 1999, before a hearing was held on his claim. The survivor's claim was filed on June 29, 1999. Director's Exhibit 2.

Judge Jeffrey Tureck denying benefits 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).[2] The administrative law judge credited the miner with thirty-six years of coal mine

[2] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court

employment and found employer to be the responsible operator. The administrative law judge further found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, but insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis in the miner's claim or death due to pneumoconiosis in the survivor's claim. Accordingly, benefits were denied on both the miner's and the survivor's claims.

On appeal, claimant argues that the administrative law judge erred in not finding that the evidence established a totally disabling respiratory impairment due to pneumoconiosis and that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[3]

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 this Board and may not be disturbed. 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 miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the

---

issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §718.204(c)(1)-(3), now 20 C.F.R. §718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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*).

To establish entitlement to survivor's benefits claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *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 to be 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 the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 506 U.S. 1050 (1993).[4]

[4] Since the miner's last coal mine employment took place in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Claimant first contends that the administrative law judge erred in not finding total disability established based on Dr. Rasmussen's opinion. In finding that a totally disabling respiratory impairment was not established in the miner's claim, the administrative law judge noted that the pulmonary function studies and blood gas studies of record failed to establish total disability and that the medical opinion evidence failed to establish a totally disabling respiratory impairment. Specifically, the administrative law judge found that the opinion of Dr. Rasmussen, the only physician to find that the miner had a respiratory impairment which prevented him from engaging in his usual coal mine employment, was not credible. Decision and Order at 5. In finding that the opinion of Dr. Rasmussen was not credible, the administrative law judge determined that Dr. Rasmussen's opinion was not well reasoned because: he failed to explain why a respiratory impairment which he characterized as minimal would disable the miner; the results of a pulmonary function study administered by Dr. Rasmussen in 1992, "were virtually identical to those obtained in 1989 in connection with the miner's state claim for black lung benefits, and [the miner had] worked for two years after that test was administered, Director's Exhibits 21, 54 at 17; and none of the other physicians' opinions of record found the miner to be disabled from his usual coal mine employment. Decision and Order at 5; Employer's Exhibits 1, 2, 5; Director's Exhibit 18. This was rational. *See U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, F.3d , 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).[5] Accordingly, we affirm the administrative law judge's finding that the evidence failed to establish that the miner had a totally disabling respiratory impairment. *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 658-659, 19 BLR 2-181, 190-191

[5] Our affirmance of the administrative law judge's rejection of Dr. Rasmussen's opinion for the reasons given, does not contravene our prior holding that the ultimate finding of disability is a legal determination to be made by the administrative law judge through consideration of the exertional requirements of the miner's usual coal mine work in conjunction with a doctor's opinion regarding claimant's physical abilities. *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). In the instant case, the administrative law judge recognized that the miner's usual coal mine employment required periods of heavy labor, Decision and Order at 5, but rejected Dr. Rasmussen's opinion because Dr. Rasmussen did not adequately reconcile his finding of minimal respiratory impairment with his finding of total disability. Decision and Order at 5.

(4th Cir. 1995). Because we affirm the administrative law judge's finding on total disability, we need not consider claimant's argument on disability causation. *See Trent, supra*; *Gee, supra*; *Perry, supra*.

Claimant next argues that the administrative law judge erred in not finding that the miner's death was due to pneumoconiosis. In finding that the evidence did not establish death due to pneumoconiosis, the administrative law judge found that the only opinion to attribute death to pneumoconiosis was not credible. Decision and Order at 5-6. Specifically, the administrative law judge found that the opinion of Dr. Kos was not clear as to whether Dr. Kos's "strong belief" that the miner's "pneumoconiosis with chronic and acute respiratory failure was a significant condition which contributed to the [miner's] death[,]" was merely speculation or a statement made with a reasoned basis to support it. Decision and Order at 6; Director's Exhibits 19, 24; Claimant's Exhibit 1. Additionally, the administrative law judge found that Dr. Kos failed to explain how the miner's death was related to his pneumoconiosis, after having explained that "the miner's stomach cancer and its sequella kept getting worse and ultimately led to his death," and "the evidence was clear that the miner's death was imminent without reference to a respiratory or pulmonary disease or condition." Decision and Order at 6; *see Jarrell, supra*. The administrative law judge further noted that the evidence showed that "it was expected that the miner was shortly going to die due to the effects of the cancer without reference to any respiratory or pulmonary symptoms," and "[t]he decision to stop treating the miner's disease and continue comfort measures was made only a day before he died, and prior to the development of respiratory distress. *Id*. Additionally, the administrative law judge noted that the other physicians' opinions of record concluded that pneumoconiosis played no role in the miner's death. Employer's Exhibits 1, 2, 4, 5. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c)(5); *see Jarrell, supra*; *Shuff, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge