

BRB No. 03-0102 BLA

CAROLYN A. DAVIDSON)	
(Widow of JOHN E. DAVIDSON, JR.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
THACKER ENERGY CORPORATION)	DATE ISSUED: 09/25/2003
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

William H. Duty, Williamson, West Virginia, for claimant.

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

Jeffrey S. Goldberg (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (02-BLA-0008) of Administrative Law Judge Robert J. Lesnick 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 instant case involves a duplicate miner's claim filed on March 10, 1994³ and a survivor's claim filed on December 26, 2000.

In a Decision and Order dated July 5, 1995, Administrative Law Judge Frederick D. Neusner credited the miner with "not more than 26.25 years" of coal mine employment and found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 45. Judge Neusner, therefore, considered the miner's 1994 claim on the merits. *Id.* Judge Neusner found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* Judge Neusner further found that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* Judge Neusner also found that the evidence was sufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c) (2000). *Id.* Accordingly, Judge Neusner awarded benefits. *Id.* In a Supplemental Decision and Order dated August 3, 1995, Judge Neusner also awarded attorney's fees. Director's Exhibit 48.

¹ Claimant is the surviving spouse of the deceased miner who died on December 27, 1999. Director's Exhibit 110.

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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The miner initially filed a claim for benefits on March 19, 1991. Director's Exhibit 28. The district director denied the claim on August 8, 1991. *Id.* There is no indication that the miner took any further action in regard to his 1991 claim.

The miner filed a second claim on March 10, 1994. Director's Exhibit 1.

Employer filed numerous motions for reconsideration of Judge Neusner's award of benefits and attorney's fee award. In response, Judge Neusner issued a series of Orders on Reconsideration, denying the relief sought by employer. *See* Director's Exhibits 45, 52, 58, 61, 63, 70, 83.

Employer subsequently appealed Judge Neusner's Decision and Order awarding benefits, Judge Neusner's Supplemental Decision and Order awarding attorney's fees, and Judge Neusner's numerous denials of employer's motions for reconsideration. By Decision and Order dated January 28, 1998, the Board affirmed Judge Neusner's finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Davidson v. Thacker Energy Corp.*, BRB No. 97-0476 BLA (Jan. 28, 1998) (unpublished). The Board, however, held that Judge Neusner did not adequately consider and weigh all of the relevant evidence in his evaluation of the merits of the miner's 1994 claim. *Id.* The Board, therefore, vacated Judge Neusner's award of benefits and remanded the case for further consideration. *Id.* The Board further held that:

Under the circumstances of this case, and in view of our decision to remand this claim to the administrative law judge for a reconsideration of the merits of entitlement, we vacate the administrative law judge's admission of the disputed post-hearing exhibits [Director's Exhibits 30, 31], as well as his finding that insurance coverage exists under an Old Republic policy, and remand this issue as well for the administrative law judge to determine the question of insurance coverage, and to rule as well whether the full development of the record on the insurance coverage issue is required. 20 C.F.R. §725.456(e). The administrative law judge should also determine whether Thacker Energy meets the remaining criteria for responsible operator in the event that insurance coverage is not demonstrated. *See* 20 C.F.R. §§725.492 (a)(4), 725.494; *Gilbert v. Williamson Coal Co.*, 7 BLR 10289, 1-293-94 (1984).

Davidson v. Thacker Energy Corp., BRB No. 97-0476 BLA (Jan. 28, 1998) (unpublished), slip op. at 8 (footnote omitted).

By Order dated June 23, 1999, Judge Neusner remanded the case to the district director "for the limited purpose of developing such additional evidence as is required to determine the issue of contingent liability of the Old Republic Insurance Company for the payment of such black lung disability benefits as may be awarded to this coal miner under the Act and regulations."⁴ Director's Exhibit 95.

⁴ In response to a motion for reconsideration filed by employer, Judge Neusner issued an Order dated September 20, 1999, reaffirming his June 23, 1999 Order. Director's Exhibit 99.

By Order dated November 16, 1999, the district director found that Old Republic Insurance Company was Thacker Energy Corporation's insurer during the miner's coal mine employment. Director's Exhibit 101. The district director referred the claim back to the Office of Administrative Law Judges for further proceedings.⁵ *Id.*

The miner died on December 27, 1999. Director's Exhibit 110. Claimant filed a survivor's claim on December 26, 2000. Director's Exhibit 105. The district director denied benefits on the survivor's claim on February 15, 2001. Director's Exhibit 111.

Both claims were forwarded to the Office of Administrative Law Judges on September 26, 2001. Director's Exhibits 116, 117.

Administrative Law Judge Robert J. Lesnick (the administrative law judge) initially addressed Old Republic Insurance Company's (Old Republic's) Motion to Dismiss filed on May 13, 2002, wherein it asserted that it is not the responsible carrier. The administrative law judge rejected Old Republic's argument that Director's Exhibits 30 and 31 were not made a part of the record while the case was before the district director on remand. The administrative law judge also denied Old Republic's motion to exclude this evidence. Moreover, the administrative law judge determined that Old Republic was employer's insurer during the miner's coal mine employment. The administrative law judge next addressed the merits of the miner's 1994 claim. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits on the miner's claim. Turning to the survivor's claim, the administrative law judge found that because the evidence was insufficient to establish the existence of pneumoconiosis, the miner's death could not be due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied benefits on the survivor's claim. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial

⁵ Employer subsequently sought reconsideration. In a letter dated December 27, 1999, the district director found that employer's motion for reconsideration was a "recapitulation of arguments repeatedly presented in earlier proceedings and which have been considered and rejected by [Judge Neusner]." Director's Exhibit 103.

of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁶

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant's statements, however, neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). We, therefore, affirm the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).⁷

⁶ The Director, Office of Workers' Compensation Programs (the Director), filed a motion to strike footnote 2 from employer's response brief. Footnote 2 addresses Old Republic Insurance Company's status as the insurance carrier. The Director argued, *inter alia*, that because claimant did not raise the liability issue on appeal and because employer/carrier failed to file an appeal or cross-appeal regarding the alj's designation of the responsible employer/carrier, the Board should strike employer/carrier's argument concerning its liability. In response, employer indicated that it was not asking the Board to reverse the administrative law judge's determination, but was seeking to preserve its objection to the administrative law judge's ruling. By Order dated April 23, 2003, the Board denied the Director's request to strike footnote 2, noting that employer concluded its discussion in footnote 2 with the statement that it was preserving its objections to the administrative law judge's finding. *Davidson v. Thacker Energy Corp.*, BRB No. 03-0102 BLA (Apr. 23, 2003) (Order) (unpublished). The Board stated that because no cross-appeal had been filed, employer could not challenge the administrative law judge's determination regarding "the due process issues." *Id.*

⁷ The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(4) are supported by substantial evidence. There is only one positive x-ray interpretation of record; Dr. Ranavaya, a B reader, interpreted the miner's April 8, 1994 x-ray as positive for pneumoconiosis. Director's Exhibit 15. However, Drs. Gaziano and Castle, both B readers, and Dr. Francke, a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 13, 14; Employer's Exhibit 3. Consequently, the administrative law judge properly found that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 9. Since there is no biopsy or autopsy evidence of

See Cox v. Benefits Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) precludes entitlement on the miner's claim, *see 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*), and the survivor's claim.⁸ *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

record, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Id.* Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). *Id.* Finally, the administrative law judge properly discredited the opinions of Drs. Fritzhand and Ranavaya, the only physicians whose opinions could support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge permissibly accorded less weight to Dr. Fritzhand's opinion that the miner "could have pneumoconiosis" based upon its equivocal nature. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 9; Director's Exhibit 28. The administrative law judge acted within his discretion in according less weight to Dr. Ranavaya's finding of pneumoconiosis because the x-ray that Dr. Ranavaya interpreted as positive for pneumoconiosis was read as negative by other physicians, thus calling into question the reliability of Dr. Ranavaya's opinion. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order 9; Director's Exhibits 9, 13-15.

⁸ Even had the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis, there is no evidence of record supportive of a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Dr. Daniels completed the miner's death certificate. Dr. Daniels indicated that the miner's death was due to carcinoma of the lung. Director's Exhibit 110. Dr. Castle was the only other physician to address the cause of the miner's death. In a report dated May 22, 2002, Dr. Castle opined that the miner's death was not caused, contributed to, or hastened in any way, by coal workers' pneumoconiosis. Employer's Exhibit 1. During a June 7, 2002 deposition, Dr. Castle opined that the miner's death was due to carcinoma of the lung. Employer's Exhibit 3 at 24. Dr. Castle further opined that the miner's work as a coal miner did not contribute to, substantially aggravate, or hasten his lung cancer. *Id.* at 27.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge