BRB No. 03-0104 BLA

ROSA L. WIMMER (Widow of RANDALL L. WIMMER) Claimant-Petitioner	)	
v.	)	DATE ISSUED: 09/30/2003
EASTERN ASSOCIATED COAL CORPORATION 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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Rosa L. Wimmer, Princeton, West Virginia, *pro se.*

Paul E. Frampton, (Bowles Rice McDavid Graff & Love PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits (01-BLA-0814) of Administrative Law Judge Linda S. Chapman (the administrative law judge) on a survivor's claim 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 found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, benefits were denied. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits.[3] The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In a survivor's claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that such pneumoconiosis arose out

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[1]Claimant is Rosa L. Wimmer, surviving spouse of the miner, Randall L. Wimmer, who died on January 4, 1993. Director's Exhibit 12. Claimant filed the instant claim for survivor's benefits on July 17, 2000. Director's Exhibit 1.

[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]Employer contends that the regulations that permit a claimant to withdraw an initial claim and file a second claim, as if the first claim were never filed, are invalid. Employer argues that such regulations deprive employer of its right to due process and to the benefit of the regulations that bar the adjudication of duplicate survivor's claims. Employer's Brief at 1-2. We decline to address employer's contention, as the issue of the validity of the regulations is not an issue properly before us.

of coal mine employment pursuant to 20 C.F.R §718.203, and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[4] The administrative law judge summarized the x-ray interpretations of record, noting that only two are positive for pneumoconiosis. Decision and Order at 6-7; Director's Exhibit 16. Based upon her review of the x-ray evidence and the qualifications of the physicians rendering the x-ray readings, the administrative law judge properly found that the preponderance of the x-ray evidence was negative. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v.Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 7. Because substantial evidence supports the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), we affirm that finding.

The administrative law judge correctly determined that the record contains no autopsy or biopsy evidence, thus claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). We, therefore, affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(2).

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[4]Employer contends that the doctrine of collateral estoppel should be applied to prevent claimant from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, as the district director found that the evidence failed to establish the existence of pneumoconiosis in the miner's claim. Employer's Brief at 12, n. 5. We decline to address employer's contention, raised in its response brief. Inasmuch as employer's argument does not advance an alternative basis for affirming the administrative law judge's denial of benefits on the merits, employer was required to file a cross-appeal in order to have its argument considered. *Shelosky v. Director, OWCP*, 7 BLR 1-34, 1-35-36 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91 (1983). Moreover, employer's contention has no merit, as the doctrine of collateral estoppel is not applicable until such time as an issue has been fully litigated. *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988); *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir. Aug. 29, 1993)(unpub.). The record reflects that the miner's claims were both denied at the district director level, prior to any formal adjudication. Director's Exhibits 41, 42. Thus, the issue of whether the miner suffered from pneumoconiosis was never fully litigated. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *Sedlack v. Braswell Services Group, Inc.*, 134 F. 3d 219 (4th Cir. 1998).

The administrative law judge did not render a finding as to whether the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(3). However, Section 718.202(a)(3) requires that one of the presumptions at 20 C.F.R. §718.304, 20 C.F.R. §718.305 or 20 C.F.R. §718.306 be applicable in order to establish the existence of pneumoconiosis thereunder. 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is not applicable to claims filed after January 1, 1982, such as the instant claim. 20 C.F.R. §718.305(e). The provisions at Section 718.306 are inapplicable unless the miner's death occurred on or before March 1, 1978, and the survivor's claim is filed prior to June 30, 1982. 20 C.F.R. §718.306(a). As claimant filed the instant survivor's claim on July 17, 2000, Director's Exhibit 1, Section 718.306 does not apply to the instant claim. Thus, as none of the presumptions referred to in Section 718.202(a)(3) is applicable in this case, claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). 20 C.F.R. §§718.202(a)(3); 718.304; 718.305; 718.306.

The administrative law judge, in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), accorded greater weight to the medical opinions of Drs. Branscomb, Fino and Tuteur, who opined that the miner did not have pneumoconiosis, Employer's Exhibits 2-5, 10, than to the contrary opinion of one of the miner's treating physicians, Dr. Sherer, Director's Exhibits 12, 19, 20. The administrative law judge found that, unlike Dr. Sherer, Drs. Branscomb, Fino and Tuteur provided detailed explanations for their conclusions, and that their view, that the miner did not have pneumoconiosis, was supported by the miner's extensive medical records. Decision and Order at 17. The administrative law judge thus determined, within her discretion, that the medical opinions of Drs. Branscomb, Fino and Tuteur were reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

While we uphold the administrative law judge's treatment of the medical opinions of Drs. Branscomb, Fino and Tuteur, the administrative law judge's weighing of the medical opinions of record at 20 C.F.R. §718.202(a)(4) cannot be affirmed because she mischaracterized the record in according less weight to Dr. Sherer's opinion. Specifically, the administrative law judge indicated that Dr. Sherer was the only physician of record who found that the miner had pneumoconiosis. Decision and Order at 16. The record actually includes the November 20, 1980 medical opinion of Dr. Piracha, wherein the doctor diagnosed the miner with minimal chronic obstructive pulmonary disease that arose from the miner's coal mine employment. Director's Exhibit 41-10. This diagnosis by Dr. Piracha falls within the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). The administrative law judge's conclusion that Dr. Sherer is the only physician of record to opine that the miner had pneumoconiosis is,

therefore, contrary to the record. Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §919(d), and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On this basis, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the medical opinion evidence.

On remand, the administrative law judge is instructed to determine the weight and credibility of the medical opinions of Drs. Piracha and Sherer, which support a finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge must indicate what weight, if any, is accorded to these medical opinions in view of her crediting of the contrary opinions rendered by Drs. Branscomb, Fino and Tuteur. If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), she must then weigh all of the relevant evidence together at Section 718.202(a) pursuant to *Compton*. If the administrative law judge finds that the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a), then the administrative law judge is instructed to determine whether claimant has established the requisite etiology at 20 C.F.R. §718.203. Further, if reached, the administrative law judge must determine whether the evidence establishes that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205.[5] *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *Tackett v. Armco, Inc.*, 17 BLR 1-103 (1993).

[5] A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge