BRB Nos. 10-0684 BLA and
11-0171 BLA

BRENDA J. JENNINGS (Widow and o/b/o SHERROL JENNINGS)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 09/16/2011
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05626 and 2008-BLA-05267) of Administrative Law Judge Jeffrey Tureck with respect to a subsequent miner's claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The hearing in this case was held on May 20, 2009. On March 23, 2010, amendments to the Act, included in the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, became effective.[2] The administrative law judge subsequently issued an Order in which he directed the parties to file position statements with respect to the applicability of the amendments. The Director, Office of Workers' Compensation Programs (the Director), and claimant responded, contending that the amendments applied to the miner's claim and the survivor's claim. Employer also responded and urged the administrative law judge to hold the case in abeyance until the legal challenges to the PPACA were resolved. Employer requested, in the alternative, that the administrative law judge reopen the record for the submission of additional evidence. The administrative law judge denied employer's request to hold the case in abeyance, but granted employer leave to file a motion to reopen the record. Employer did not respond.

[1] The miner filed his initial claim on February 4, 1985, which was denied by the district director on June 10, 1985. Director's Exhibits 1-160, 1-10. The miner took no further action until he filed a subsequent claim on October 15, 2001, which was denied by the district director on August 21, 2003, for failure to establish any element of entitlement. Director's Exhibits 2-452, 2-4. No additional action was taken until the miner filed a second subsequent claim on September 15, 2006. Director's Exhibit 4. The miner died on June 4, 2007, while this claim was still pending. Director's Exhibit 51. Claimant, the widow of the miner, filed an application for survivor's benefits on June 26, 2007 and is continuing to pursue the miner's claim on behalf of his estate. Director's Exhibits 51, 52.

[2] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Pursuant to amended Section 921(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). Amended Section 932(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

In a Decision and Order issued on August 19, 2010, the administrative law judge credited the miner with fifteen years of coal mine employment, based on the stipulation of the parties, and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. With respect to the miner's claim, the administrative law judge found, based on the newly submitted evidence, that claimant established that the miner was totally disabled at 20 C.F.R. §718.204(b)(2), and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). The administrative law judge then determined that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis and that employer failed to rebut it. Upon considering the survivor's claim, the administrative law judge found, pursuant to amended Section 411(c)(4), 30 U.S.C. §921(c)(4), that claimant is entitled to benefits based on the award of benefits in the miner's claim. Accordingly, the administrative law judge awarded benefits in both claims.

Employer appeals, arguing that the administrative law judge erred by not issuing his Decision and Order within twenty days of the termination of the hearing, as required by 20 C.F.R. §725.476. Employer asserts that, because it was prejudiced by this delay, it must be dismissed and liability must be transferred to the Black Lung Disability Trust Fund. Employer further contends that, in the miner's claim, the administrative law judge did not properly weigh the medical opinion evidence relevant to rebuttal of the presumption that the miner was totally disabled due to pneumoconiosis. Based on this error, employer maintains that the award of benefits in the survivor's claim cannot stand. Claimant responds and urges affirmance of the award of benefits. The Director has filed a limited brief and asserts that employer's argument regarding 20 C.F.R. §725.476 is without merit.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination as to the length of the miner's coal mine employment and his findings that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 5, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

I. 20 C.F.R. §725.476

Employer argues that, pursuant to 20 C.F.R. §725.476, the administrative law judge should have issued his Decision and Order well before the effective date of the amendments to the Act.[5] Employer contends that, because the parties' respective burdens were "drastically altered" by the enactment of the PPACA, employer's interests were prejudiced by the untimely issuance of the Decision and Order. Employer's Brief at 9. In support of its argument, employer asserts that, based on the administrative law judge's findings in the miner's claim, if the burden of persuasion had been on claimant to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, the administrative law judge would have denied benefits.

The Director responds and contends that 20 C.F.R. §725.476 is not mandatory or jurisdictional, as it does not identify a consequence for failure to comply with its terms. The Director also argues that, even if the provision is mandatory, employer waived any objection by failing to raise the issue before the administrative law judge. The Director notes, additionally, that employer has not established that it has suffered any prejudice. Claimant joins the Director in maintaining that employer waived its objection to the late issuance of the Decision and Order by failing to raise it before the administrative law judge.

Upon consideration of the parties' arguments on appeal, we agree with claimant and the Director, that employer waived any objection to the administrative law judge's failure to comply with 20 C.F.R. §725.476, as employer did not raise the issue when the twenty-day time period following the termination of the hearing elapsed or when it filed its position statement on the applicability of the amendments to the Act. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984). Accordingly, we will not address employer's arguments regarding 20 C.F.R. §725.476.

II. The Merits of the Claims

In order to establish entitlement to benefits in the miner's claim, pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.3,

[5] The terms of 20 C.F.R. §725.476 provide, "[w]ithin 20 days after the official termination of the hearing (*see* [20 C.F.R.] §725.475), the administrative law judge shall issue a decision and order with respect to the claim making an award to the claimant, rejecting the claim, or taking such other action as is appropriate." 20 C.F.R. §725.476.

718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

A. The Administrative Law Judge's Findings

The administrative law judge noted that it was undisputed that the miner had a totally disabling respiratory impairment prior to his death. Decision and Order at 4. Therefore, based on the parties' stipulation to fifteen years of underground coal mine employment, and relying on amended Section 921(c)(4), the administrative law judge concluded that the miner was presumed to have been totally disabled due to pneumoconiosis. *Id*.

The administrative law judge then considered whether employer rebutted the presumption by proving that the miner did not have pneumoconiosis or that his totally disabling impairment was not due to pneumoconiosis. Decision and Order at 4. The administrative law judge determined that the x-ray evidence was negative for pneumoconiosis under 20 C.F.R. §718.202(a)(1). *Id*. at 4-6. The administrative law judge also found that the pathology evidence, obtained for diagnosing the miner's lung cancer, was not relevant to establishing either the presence or absence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). *Id*. at 6. With respect to the CT scan evidence, the administrative law judge determined that it was negative for pneumoconiosis pursuant to 20 C.F.R. §§718.107, 718.202(a)(4).

In weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge concluded that Dr. Hardison, one of the miner's treating physicians, did not provide a credible diagnosis of pneumoconiosis, and that none of the reports from the miner's treating physicians was sufficient to rebut the presumption of total disability due to pneumoconiosis. Decision and Order at 7; Director's Exhibit 2; Claimant's Exhibit 4. The administrative law judge further found that Dr. Simpao's 2001 diagnosis of pneumoconiosis was not entitled to any weight since it was based on a positive x-ray, and the administrative law judge determined that the x-ray evidence was negative for pneumoconiosis. Decision and Order at 7; Director's Exhibit 2 at 428. Concerning Dr. Simpao's 2006 evaluation of the miner, the administrative law judge also found that it was not entitled to any weight, as Dr. Simpao did not explain his conclusions and his deposition testimony showed "that he does not understand the concepts of clinical and legal pneumoconiosis; is unaware that coal mine dust exposure is not a known cause of lung cancer; and is unaware that a category 0/1 x-ray reading is a negative reading under §718.102(b)." Decision and Order at 7; Director's Exhibit 12 at 27; Employer's Exhibit 3 at 5.

The administrative law judge determined that the report in which Dr. Rasmussen diagnosed pneumoconiosis contained "numerous errors in the list of evidence he reviewed" and that "[t]his sloppiness makes one question how much attention Dr. Rasmussen paid to the evidence he is reviewing." Decision and Order at 7-8; Claimant's Exhibit 7. The administrative law judge noted that Dr. Rasmussen did not cite to any evidence to support his diagnosis of clinical pneumoconiosis, but even assuming that he relied on his x-ray readings, his findings conflicted with the administrative law judge's determination that the x-ray evidence was negative for pneumoconiosis. Decision and Order at 8. The administrative law judge further indicated that "the most serious deficiency" in Dr. Rasmussen's opinion was his failure to adequately address the miner's extensive smoking history when identifying coal dust exposure as a significant contributor to the miner's disability. *Id*. The administrative law judge concluded that Dr. Rasmussen's opinion was "pure supposition," as his only basis for his conclusion was that coal dust exposure can cause chronic obstructive pulmonary disease (COPD). *Id*. Therefore, the administrative law judge stated that Dr. Rasmussen's opinion was not entitled to any weight. *Id*.

The administrative law judge found Dr. Selby's opinion, that the miner's coal mine employment did not contribute to his respiratory impairment, to be insufficient to rebut the presumption that the miner is totally disabled due to pneumoconiosis. Decision and Order at 9; Employer's Exhibit 1. The administrative law judge determined that Dr. Selby did not explain his finding, but rather "simply conclude[d] that if the decedent had never smoked cigarettes[,] he would have no clinically significant pulmonary disease." Decision and Order at 9.

With respect to Dr. Repsher's opinion, that the miner did not have pneumoconiosis or any dust-related lung disease, the administrative law judge noted that Dr. Repsher relied on his analysis of medical literature that shows that "the average miner will not suffer a statistically significant loss of lung function due to his exposure to coal mine dust."[6] Decision and Order at 9; Employer's Exhibit 2. The administrative law judge concluded that Dr. Repsher's opinion was not credible, as "Dr. Repsher would never

[6] Dr. Repsher stated, "on the average, the amount of obstructive lung disease related to [the] inhalation of coal mine dust is very, very small and would not be measurable, individually measurable in the miner himself." Employer's Exhibit 2 at 14. Dr. Repsher explained that the only way to detect this statistically is to test a large group of dust-exposed coal miners and compare the results to a large group of workers in a non-dusty industry. *Id*. In the medical literature he relied on, Dr. Repsher identified the two most relevant articles as one by Morgan and Lapp, showing that generally coal miners with 0/0 through 3/3 simple pneumoconiosis have normal lung function, and one by Attfield and Hodous, with graphs showing that the effect of coal mine dust is negligible when compared with the effect of cigarette smoke. *Id*. at 15.

conclude that a smoking miner's respiratory impairment was due to his coal dust exposure." Decision and Order at 9.

Based upon these findings, the administrative law judge determined that the evidence was insufficient to rebut the fifteen-year presumption of total disability due to pneumoconiosis, as employer did not prove that the miner did not have legal pneumoconiosis or that coal dust exposure was not a contributing cause of the miner's total disability. Decision and Order at 9. Accordingly, the administrative law judge awarded benefits in the miner's claim. *Id*. at 9-10. Then, based on amended Section 932(*l*), the administrative law judge determined that claimant was automatically entitled to survivor's benefits. *Id*. at 10.

B. Arguments on Appeal

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Selby and Repsher. Employer indicates that, contrary to the administrative law judge's finding, Dr. Selby's conclusion, that if the miner had never smoked, he would not have clinically significant pulmonary disease, was sufficient to rebut the presumption of total disability due to pneumoconiosis. Employer states that Dr. Selby cited to objective medical evidence and the miner's significant cigarette smoking history to support his opinion. In addition, employer argues that Dr. Repsher's opinion was also sufficient to rebut the presumption. Employer indicates that, because Dr. Repsher related his findings to the miner's specific case, the administrative law judge's determination that Dr. Repsher would never conclude that a cigarette smoker's impairment is due to coal dust exposure, was incorrect. Therefore, employer asserts that the administrative law judge "created an irrebuttable presumption of disability due to pneumoconiosis." Employer's Brief at 12.

Contrary to employer's contention, the administrative law judge rationally determined that Dr. Selby's opinion was insufficient to rebut the presumption. The administrative law judge acted within his discretion in basing his finding upon the fact that, although Dr. Selby concluded that the miner's COPD and lung cancer were due solely to the miner's seventy-five pack-year cigarette smoking history, he did not identify the basis for his opinion or explain how he ruled out coal dust exposure as a contributing factor. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

The administrative law judge also acted within his discretion in finding that Dr. Repsher's opinion did not establish rebuttal of the presumption. *Id*. The administrative law judge considered Dr. Repsher's statement, that "in this individual coal miner, to an overwhelming probability, any detectable COPD would be the result of cigarette smoking

and/or asthma but not the result of the inhalation of coal mine dust." Decision and Order at 9, *citing* Employer's Exhibit 2. Nevertheless, the administrative law judge rationally determined that, because Dr. Repsher relied on the premise that an individual miner does not suffer a statistically significant loss of lung function due to coal dust exposure, Dr. Repsher would not identify coal dust exposure as the cause of any pulmonary impairment suffered by a miner who smoked. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

We affirm the administrative law judge's finding, therefore, that employer did not rebut the fifteen-year presumption set forth in amended Section 921(c)(4), as employer did not make an affirmative showing that the miner did not suffer from pneumoconiosis, or that his totally disabling impairment was not related to coal mine work. *See Morrison v. Tenn. Consol. Coal Co.*, F.3d , 2011 WL 2739770 (6th Cir. 2011). Consequently, we affirm the award of benefits in the miner's claim and the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(*l*).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge