BRB No. 94-2178 BLA

ELMER COLEMAN Claimant-Petitioner v. HAWKINS COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents 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 Bernard J. Gilday, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Sirina Tsai (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (90-BLA-0581) of Administrative

[1] Claimant is Elmer Coleman, the miner, whose claim for benefits filed on April 6,

Law Judge Bernard J. Gilday, Jr. denying benefits on

1987 was denied on September 21 and December 31, 1987. Director's Exhibits 12, 13. After additional evidence submitted in connection with claimant's state workers' compensation claim was considered, claimant's federal claim was again denied on August 29 and December 4, 1989. Director's Exhibit 15. Thereafter, claimant requested a hearing before an administrative law judge. Director's Exhibit 39.

a 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). This case is before the Board for the second time. In *Coleman v. Hawkins Coal Co*., BRB No. 91-1567 BLA (Nov. 26, 1993)(unpub.), the Board affirmed the administrative law judge's findings regarding length of coal mine employment and that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but vacated his findings pursuant to 20 C.F.R. §§718.203(b), 718.204, and remanded the case for reconsideration.

On remand, the administrative law judge found the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) unrebutted, and the existence of a totally disabling respiratory impairment established pursuant to Section 718.204(c). The administrative law judge, however, found the evidence insufficient to establish that claimant's total respiratory disability was due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his weighing of the medical evidence at Section 718.204(b). Claimant's Brief at 2-5; Claimant's Reply Brief at 1-3. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge mischaracterized the evidence and erred in his analysis at Section 718.204(b). Director's Brief at 3-4. Employer replies that the Director lacks standing to participate in this appeal.[2] Employer's Reply Brief at 2.

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 law. 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).

Employer contends that because the Director's administrative or policy interests are not implicated by the administrative law judge's decision, the Director is not adversely affected and therefore lacks standing to raise any issues regarding the

[2] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

administrative law judge's weighing of the evidence. Employer's Reply Brief at 2.

The Act provides that the Director is a party to any black lung proceeding before the Board. 30 U.S.C. §932(k); *see* 20 C.F.R. §§725.360(a)(5), 802.201(a); *Hodges v. BethEnergy Mines, Inc*., 18 BLR 1-84 (1994). The Director has standing not only to represent the government's interests in cases in which the Director is the respondent and in which the Black Lung Disability Trust Fund is secondarily liable, *Krolick Contracting Corp. v. Benefits Review Board*, 558 F.2d 685, 689 (3d Cir. 1977), but also to ensure the proper enforcement and lawful administration of the black lung program. 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*); *Capers v. The Youghiogheny and Ohio Coal Co*., 6 BLR 1-1234 (1984). The Board has held that, pursuant to Section 422(k), 30 U.S.C. §932(k), the Director occupies a unique position in proceedings under the Act, and application of the general prohibition against the raising of another party's rights is negated. *Hodges*, 18 BLR at 1-88; *see Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)(generally, litigant must assert his own legal rights and interests, not those of third parties). Therefore, we reject employer's contention that the Director lacks standing to challenge the administrative law judge's weighing of the evidence.

Both the Director and claimant argue that the administrative law judge erred at Section 718.204(b) by mischaracterizing Dr. Mettu's opinion as failing to state the cause of claimant's impairment, when Dr. Mettu linked claimant's impairment to his coal mine employment. Director's Brief at 3; Claimant's Reply Brief at 1.

At Section 718.204(b), the administrative law judge stated that "Dr. Mettu . . . did not indicate the etiology" of claimant's impairment. Decision and Order at 5. He then considered the opinions of Drs. Penman, Varney, Broudy, and Zaldivar, and accorded greater weight to the conclusions of Drs. Broudy and Zaldivar that claimant's impairment was due to causes other than pneumoconiosis, based on their superior qualifications.[3] *Id*.

Dr. Mettu diagnosed chronic bronchitis which he linked to claimant's coal mine employment, *see* 20 C.F.R. §718.201, opining that claimant suffered a moderate impairment of pulmonary function which rendered him totally disabled. Director's Exhibit 8. When asked to provide a rationale for his conclusion that claimant was

[3] A review of the record reveals no evidence of Dr. Broudy's or Dr. Zaldivar's credentials, and the administrative law judge did not take judicial notice of them. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135 (1990), *aff'd sub nom. Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992).

totally disabled, Dr. Mettu repeated the diagnosis of chronic bronchitis and related his objective study findings. *Id*.

Inasmuch as the administrative law judge mischaracterized Dr. Mettu's opinion and his determination to accord greater weight to the opinions of Drs. Broudy and Zaldivar, based on their superior qualifications, is unsupported by the record, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*), we vacate his finding at Section 718.204(b) and remand the case for him to reconsider the relevant evidence.

Because Drs. Broudy and Zaldivar did not diagnose pneumoconiosis, and this case arises within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit, *see* Director's Exhibits 3, 20, we instruct the administrative law judge on remand to consider the causation opinions of Drs. Broudy and Zaldivar in light of *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989)(administrative law judge permissibly rejected causation opinion because it was rendered under mistaken belief that claimant had no pneumoconiosis), and *Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993)(opinion finding no pneumoconiosis deprived of probative value concerning causation of respiratory impairment). *See Bobick v. Saginaw Mining Co*., 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp*., 8 BLR 1-472 (1986).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge