

BRB No. 97-0437 BLA

MARIE BEDNARIK )  
(Widow of JOSEPH A. BEDNARIK) )  
 )  
 Claimant-Petitioner )  
 v. ) DATE ISSUED:  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Remand and Order on Claimant's Motion for Reconsideration of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Gary K. Stearman (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Order on Claimant's Motion for Reconsideration (92-BLA-0848 and 93-BLA- 0120) of Administrative Law Judge Robert G. Mahony denying benefits on a miner's claim and 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 case is before the Board for a second time. In his original Decision and Order, the administrative law judge found that the miner's initial claim, filed with the Social Security Administration (SSA) on March 7, 1973, was abandoned.<sup>1</sup>

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<sup>1</sup> There are separate exhibits for the miner's and widow's claims. The Director's Exhibits in the miner's claim are referred to as "MDX," while the claimant's exhibits in the miner's claim are referred to as "MCX." The Director's Exhibits in the widow's claim are referred to as "WDX," while the claimant's Exhibits in the widow's claim are referred to as "WCX."

MDX 1. He, therefore, considered the miner's second claim, filed on October 20, 1985, to be a duplicate claim subject to review under 20 C.F.R. Part 718. The administrative law judge noted that the parties stipulated to eight years of coal mine employment. He further found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). The miner appealed, and while the case was pending on appeal, the miner died on November 2, 1988. The miner's widow, claimant herein, filed a motion for modification on May 17, 1991. MDX 30. On July 30, 1991, the Board dismissed the appeal, and remanded the case to the district director for consideration of claimant's modification request. *Bednarik v. Director, OWCP*, BRB No. 89-0535 BLA (July 30, 1991) (unpub. Order); MDX 30.

Meanwhile, claimant filed a survivor's claim on June 17, 1991. WDX 1. The miner's and widow's claims were consolidated for hearing before the administrative law judge. In his Decision and Order dated September 14, 1993, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge concluded that claimant failed to establish modification in the miner's claim pursuant to 20 C.F.R.

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The miner initially filed a claim with the Social Security Administration (SSA) on March 7, 1973. MDX 27. The SSA denied benefits on July 5, 1973. *Id.* In accordance with the Black Lung Benefits Reform Act of 1977, the miner elected review of his denied claim by the SSA. *Id.* The SSA again denied benefits on June 19, 1979. *Id.* The claim was then forwarded to the Department of Labor (DOL) for review. MDX 19. The DOL issued a denial on June 30, 1980, wherein it informed the miner of his right to a hearing, but failed to inform him of the sixty day limitation for making his hearing request. MDX 21. The miner requested a hearing five years later, but his request was refused, and he was directed to file a new claim. MDX 24. The miner filed a new claim on October 20, 1985. MDX 1.

§725.310. He also found that claimant failed to establish entitlement in the widow's claim under Part 718. Although claimant filed a motion for reconsideration, the administrative law judge reaffirmed his denial of benefits on November 13, 1996. On appeal, the Board ruled that the miner's initial SSA claim was still viable when he filed his second claim in 1985; therefore, the second claim merged with the first claim. *Bednarik v. Director, OWCP*, BRB No. 94-2210 BLA (Oct. 26, 1995) (unpublished). The Board held that the filing date of the first claim became April, 1978, the month in which the miner elected review of his denied SSA claim. *Bednarik*, slip op. at 3. Consequently, the Board vacated the denial of benefits, and remanded the case for consideration of the miner's claim pursuant to *Phipps v. Director, OWCP*, 17 BLR 1-39 (*en banc*) (Smith, J., concurring; McGranery, J., concurring and dissenting), followed by reconsideration under Part 718. *Id.* The administrative law judge was further instructed to reconsider all of the evidence of record relevant to the widow's claim under Part 718. *Bednarik*, slip op. at 4. Additionally, the Board required the administrative law judge to reconsider Dr. Cohen's opinion pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

This appeal arises from the administrative law judge's Decision and Order on Remand dated June 18, 1996. In considering the miner's claim, the administrative law judge determined that claimant failed to invoke the interim presumption pursuant to 20 C.F.R. §410.490. The administrative law judge also found the record evidence insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Inasmuch as claimant was unable to establish pneumoconiosis, the administrative law judge denied benefits in both the miner's and the widow's claims. The administrative law judge further denied claimant's motion for reconsideration in an Order dated November 13, 1996. Claimant appeals, arguing that the administrative law judge erred in weighing the x-ray evidence. Claimant further contends that the administrative law judge erred in rejecting Dr. Cohen's opinion relevant to whether the miner had pneumoconiosis, and whether the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, requesting that the case be remanded to the administrative law judge for proper consideration of the x-ray and medical opinion evidence relevant to whether claimant established the existence of pneumoconiosis.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant and the Director are in agreement that the administrative law judge's denial of benefits must be vacated. With respect to the miner's claim, the interim presumption at 20 C.F.R. §410.490 is invoked if claimant is able to establish the existence of pneumoconiosis based on the x-ray evidence. Under 20 C.F.R. §410.490(b)(1)(i), the administrative law judge found that a preponderance of the x-ray evidence of record is negative for pneumoconiosis. Decision and Order (D&O) on Remand at 4. On reconsideration, however, the administrative law judge acknowledged that since the miner's

claim was filed before January 1, 1982, and the July 25, 1988 x-ray was originally interpreted as positive for pneumoconiosis by Dr. Bassali, a B-reader, additional readings of the July 25, 1988 x-ray would have to be excluded from consideration pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). Order on Claimant's Motion for Reconsideration (Nov. 13, 1996). Although the administrative law judge excluded the readings of the July 25, 1988 x-ray by Drs. Aycoth, Sargent, and Cole, he still concluded that claimant failed to establish the existence of pneumoconiosis. *Id.* The administrative law judge specifically found Dr. Bassali's positive reading of the July 25, 1988 film outweighed by three negative readings of a film dated January 14, 1986, noting that the negative x-ray reports identified carcinoma, and were more consistent with the x-rays predating 1986, finding no pneumoconiosis. *Id.*

On appeal, the Director correctly points out that the Section 413(b) prohibition does not apply to x-ray re-readings obtained by claimant. See *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985). Thus, the administrative law judge erred in excluding Dr. Aycoth's positive reading of the July 25, 1988 film. Inasmuch as the administrative law judge has not properly considered all of the relevant x-ray evidence in finding that claimant failed to establish pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i), we vacate his denial of benefits.

Furthermore, claimant correctly argues that the administrative law judge erred in finding that she failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although the administrative law judge found that Drs. Cohen and Badding opined that the miner suffered from chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure,<sup>2</sup> he rejected their opinions as being not well reasoned, and thus not sufficient to support a finding of legal pneumoconiosis. D&O on Remand at 8; MCX 1, WCX 5. With respect to Dr. Cohen's opinion, the administrative law judge noted the doctor's physical findings and his evaluation of the pulmonary function study evidence were too inconsistent to support a diagnosis of COPD. D&O on Remand at 9. The administrative law judge further found that Dr. Cohen did not discuss the miner's lung cancer. *Id.* In rejecting Dr. Badding's opinion at Section 718.202(a)(4), the administrative law judge commented that

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<sup>2</sup> The record also includes the opinions of Drs. Hughes and Hessel. Dr. Hughes diagnosed bronchitis, but opined that the condition was not attributable to coal dust exposure. MDX 10. In contrast, Dr. Hessel diagnosed emphysema, stating that it could be due to coal dust exposure. MDX 11. The administrative law judge permissibly rejected Dr. Hessel's opinion as equivocal at 20 C.F.R. §718.202(a)(4). See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order on Remand at 10.

the doctor only attributed claimant's COPD to coal mine employment in the absence of a smoking history. *Id.*

Contrary to the administrative law judge's finding, Dr. Cohen's handwritten notes from 1979 through 1987 contain physical findings of prolonged expiration, wheezing, rhonchi, and hyperinflation which would tend to corroborate the doctor's statement that the miner has consistently exhibited symptoms associated with chronic lung disease. WCX 5 (handwritten notes dated August 18, 1980, December 16, 1980, January 21, 1982, and February 3, 1983). Moreover, the administrative law judge abused his discretion in concluding that Dr. Cohen's evaluation of the pulmonary function study evidence is inconsistent with a diagnosis of COPD. As noted by the Director, although the administrative law judge faulted Dr. Cohen for not explaining the normal FEV1 scores, the doctor did not rely on those scores to diagnosis COPD. Rather, the doctor based his diagnosis of COPD on the ratio of the FEV1 and FVC. To the extent that the administrative law judge substituted his own evaluation of the pulmonary function evidence for that of Dr. Cohen, the administrative law judge's analysis is in error. See *Hall v. Consolidation Coal Co.*, 6 BLR 1306 (1984). Although the weighing of the evidence is for the administrative law judge, the interpretation of medical data is for the medical experts. See *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

The administrative law judge also erred in finding that Dr. Cohen did not discuss the role of the miner's lung cancer. In his November 3, 1992 report, Dr. Cohen specifically stated that the miner had moderate to severe obstructive lung disease and subsequently developed cancer in 1986, two years prior to his death. WCX 5. Dr. Cohen opined that lung cancer further reduced the miner's moderate obstructive respiratory impairment, and that the combination of lung cancer and COPD ultimately caused the miner's death. *Id.*

Additionally, we vacate the administrative law's findings under Section 718.202(a)(4), given his treatment of Dr. Badding's opinion.<sup>3</sup> Contrary to the administrative law judge's finding, it is permissible to infer that a respiratory disease arose out of coal mine employment when there is no other potentially causative factor for the disease. See 4 Fed. Reg. 13687 (Feb. 29, 1980) (permitting a diagnosis of pneumoconiosis by exclusion); see also *Wisniewski v. Director, OWCP*, 929 F.2d 952, 15 BLR 2-57 (3d Cir. 1991). Thus, the administrative law judge erred in rejecting Dr. Badding's opinion simply because the doctor noted that there was no other cause for the miner's COPD other than coal mine employment. D&O on Remand at 9; WDX 6.

On remand, the administrative law judge must reconsider the x-ray evidence under Section 410.490(b)(1)(i) to determine whether claimant established the existence of

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<sup>3</sup> Claimant did not specifically assign error to the administrative law judge's treatment of Dr. Badding's opinion, but the Director raises this issue. Director's Brief at 7-8.

pneumoconiosis. If claimant establishes the existence of pneumoconiosis at Section 410.490(b)(1)(i), the administrative law judge must then determine whether the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 410.490(b)(2). Thereafter, the administrative law judge must consider whether rebuttal of the presumption has been established under any of the methods contained at 20 C.F.R. §727.203(b), as set forth in *Phipps*. If claimant is unable to establish entitlement pursuant to *Phipps*, the administrative law judge must reconsider entitlement in the widow's claim at Part 718.

Accordingly, the administrative law judge's Decision and Order on Remand and the Order on Claimant's Motion for Reconsideration denying benefits are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge