BRB No. 00-0590 BLA

MARY KATHRYN EVANS (Widow of ALVIN EVANS)	)	
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 Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Mary Kathryn Evans, Wilmington, North Carolina, *pro se*.

Rita A. Roppolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-0126) of Administrative Law Judge Mollie W. Neal on a miner's and survivor's claim [1] filed pursuant to the provisions of Title IV of the Federal

[1]The miner filed three claims for benefits. The most recent claim was filed on April 1, 1992, and was denied by the district director for failure to establish any element

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 that the miner's claim constitutes a duplicate claim, and on the basis of the previous administrative law judge's finding and the Director's concession that the miner suffered from a totally disabling respiratory impairment, determined that a material change in conditions was established pursuant to 20 C.F.R. §725.309 (1999).[3] Thus, the administrative law judge considered the miner's claim on its merits. Initially, the administrative law judge found that the miner established eight years and three months of coal mine employment but then found that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) - (4) and 718.203(a)(2000). The miner's claim was therefore denied. With regard to the survivor's claim, the administrative law judge found that since the threshold issue of the existence of pneumoconiosis was not established, claimant could not establish her entitlement to survivor's benefits. Accordingly, both

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of entitlement. The miner appealed, and the case was forwarded to the Office Administrative Law Judges. The miner testified at the hearing on January 25, 1996, but died on March 16, 1996. Director's Exhibit 1. On July 15, 1996, Administrative Law Judge Edith Barnett denied benefits, finding that the miner was totally disabled, but that the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 58. Claimant, Mary K. Evans, the widow of the miner, appealed to the Benefits Review Board and also filed a survivor's claim on August 1, 1996. The Board vacated the Decision and Order, and granted the Director's request for remand to provide the miner with a complete pulmonary evaluation. *Evans v. Director, OWCP*, BRB No. 96-1448 BLA (April 14, 1997); Director's Exhibit 63. On remand, the miner's and survivor's claims were consolidated. After considering additional evidence, the claims were again denied by the district director, on October 16, 1996. Director's Exhibit 80. The district director found that the miner had a totally disabling respiratory impairment but that the evidence did not demonstrate that he had pneumoconiosis arising out of coal mine employment. Claimant then requested a hearing before an administrative law judge.

[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 65 Fed. Reg. 80, 045-80, 107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The amendments to the regulation at 20 C.F.R.§725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R.§725.2(c), 65 Fed. Reg. 80, 057 (2000).

claims were denied. The Director, Office of Worker's Compensation Programs (the Director), has responded to claimant's *pro se* appeal with a Motion to Remand. In her motion, the Director urges the Board to remand the case to the district director for further development of the evidence so that the Department of Labor can meet its obligation to provide the miner with a complete pulmonary examination.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001. Claimant, and the Director, have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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); *see O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304 (2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993);

Neeley v. Director, OWCP, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

First, we consider the administrative law judge's findings with respect to the x-ray evidence at Section 718.202(a)(1) (2000). The administrative law judge found that the record contains thirty-two readings of twenty-one x-rays, of which nineteen readings were neither interpreted nor classified for the presence of pneumoconiosis and therefore, had no probative value. Decision and Order at 20. The administrative law judge then found that of the remaining thirteen readings, eight were interpreted as negative for the existence of pneumoconiosis, of which seven were by highly qualified physicians who were either B-readers, board-certified radiologists, or both. *Id*. Of the remaining five interpretations, the July 19, 1993 x-ray was read positive for complicated pneumoconiosis by Dr. Alexander, positive for simple pneumoconiosis by Dr. Goldstein, but was determined to be "unreadable" by Dr. Sargent. Director's Exhibits 84, 85; Claimant's Exhibit 13. The administrative law judge also found that Drs. Cole and Sargent determined that the May 14, 1992 x-ray was unreadable, but noted that a third physician, Dr. Wiot, read the May 14, 1992 x-ray as negative for pneumoconiosis. Director's Exhibits 19 - 21.

Considering the x-ray evidence in its entirety, the administrative law judge found that the weight of the evidence is insufficient to establish the existence of pneumoconiosis. The administrative law judge found that with respect to both the May 14, 1992 and July 19, 1993 x-rays, the "unreadable" findings rendered the x-rays insufficient to prove or disprove the existence of pneumoconiosis. Decision and Order at 20. The administrative law judge also found that the interpretations of the July 19, 1993 x-ray by two highly qualified readers, Drs. Alexander and Sargent, were equally probative in that there was no independent basis in the record to credit one physician's opinion over the other, and that Dr. Goldstein's[4] positive interpretation was outweighed by all the other readings by highly qualified physicians, and was questionable given the remote history of the last exposure to coal mine dust, nearly forty-two years prior. *Id*. Based on the administrative law judge's permissible reliance on the numerical superiority of the interpretations by the more highly qualified physicians, we affirm the finding that the existence of pneumoconiosis has not been established by x-ray evidence. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

[4]The administrative law judge mistakenly refers to Dr. Bernstein. Decision and Order at 20.

The administrative law judge next considered whether biopsy or autopsy evidence establishes the presence of pneumoconiosis at Section 718.202(a)(2) (2000). The administrative law judge found that an autopsy was not performed, but that the record contains a biopsy of lung tissue taken in December 1986. The administrative law judge found that although Dr. Williams diagnosed idiopathic pleural effusion, mild to moderate interstitial fibrosis and chronic obstructive lung disease, this diagnosis was insufficient to meet the regulatory definition of pneumoconiosis. Decision and Order at 21; Director's Exhibits 16, 28, 32, 42, 51, 66. The administrative law judge also found that Dr. Naeye reviewed slides of lung tissue, found some acute and chronic inflammation and some interstitial tissue, but concluded the specimen was inadequate to diagnose coal workers' pneumoconiosis. Director's Exhibit 42. As the administrative law judge properly found that the diagnoses rendered by Drs. Williams and Naeye were insufficient to meet the definition of pneumoconiosis, in that neither physician opined that the miner's condition arose out of coal mine employment, we affirm her finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2) (2000). 20 C.F.R. §718.201(a)(1) and (2) (2000).

At Section 718.202(a)(3) (2000), the administrative law judge properly determined that the presumptions contained at Sections 718.305 and 718.306 (2000) were inapplicable based on the filing date of the claims. *See* 20 C.F.R. §§718.305, 718.306 (2000). Regarding Section 718.304 (2000), although Dr. Alexander diagnosed complicated pneumoconiosis,[5] the administrative law judge permissibly found that the weight of the evidence does not support this diagnosis, and thus, the presumption at this subsection is not invoked. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

[5]Dr. Alexander diagnosed complicated pneumoconiosis, category A, 2/2, q/t. Claimant's Exhibit 13.

Lastly, the administrative law judge considered the medical opinions at Section 718.202(a)(4) (2000). The administrative law judge found that the opinions by Drs. Musselwhite, Kraman, Gottovi, Allen, and Fulkerson were insufficient to establish the existence of pneumoconiosis. Decision and Order at 22- 23. The administrative law judge also considered Dr. Rand's opinion[6] that the miner's pulmonary fibrosis may be related to his rheumatoid arthritis, and in part, related to coal-mine dust exposure, based upon lung biopsy. Because Dr. Rand did not state the basis for his opinion, the administrative law judge found Dr. Rand's opinion unreasoned, and noted that two pathologists who reviewed the lung biopsy, Drs. Williams and Naeye, did not find a dust-induced lung disease. Decision and Order at 22- 23; Director's Exhibits 30, 51, 66. Inasmuch as the administrative law judge found Dr. Rand's opinion to be unreasoned, we grant the Director's request to remand this case given the Director's concession that the Department of Labor failed to provide the miner with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b) (2000); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Consequently, we vacate the administrative law judge's findings at Section 718.202(a)(4) (2000) and remand the case for further development of the evidence. Moreover, we vacate the administrative law judge's finding that claimant failed to establish entitlement to survivor's benefits inasmuch as this determination is based upon claimant's failure to establish the existence of pneumoconiosis. On remand, the pulmonary expert should be informed that the Director concedes that the miner suffered from a totally disabling respiratory impairment prior to his death.

Lastly, we agree with the Director that the administrative law judge's computation regarding the miner's length of coal mine employment is inconsistent with the United States Court of Appeals for the Eighth Circuit's holding in *Yauk v. Director, OWCP*, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989), that if a miner can establish coal mine employment for 125 working days in a year, the miner will be credited with one year of coal mine employment. We therefore vacate the administrative law judge's determination that claimant established eight years and three months of coal mine employment, and remand for further consideration of the relevant evidence regarding this issue.[7]

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[6]Dr. Rand had previously examined the miner. Director's Exhibit 77. Upon remand of this case, the Department of Labor submitted further questions to Dr. Rand in order for the Director to comply with her obligation to provide the miner with a complete pulmonary examination.

[7]The Director correctly notes that the administrative law judge's finding was based upon the miner's testimony and without consideration of the contrary

evidence provided by the Social Security Administration. *See* Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, vacated in part, and the case is remanded to the district director for further development of the evidence and reconsideration of the merits of the miner's and survivor's claims in light of the new evidence.[8]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[8]The Director notes in her brief that claimant may have additional evidence to submit which is not currently in the record. Director's Brief at 3, footnote 2. Claimant may submit such evidence to the district director upon remand.