BRB No. 05-0726 BLA

CALLIE HARVILLE o/b/o and Widow of RUFUS C. HARVILLE	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 04/10/2006
LAUREL RIVER COAL PROCESSING	)	
and	)	
AMERICAN RESOURCES 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 – Denial of Miner's Benefits and Survivor's Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Miner's Benefits and Survivor's Benefits (04-BLA-5430 and 04-BLA-5732) of Administrative Law Judge Joseph E. Kane 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 Act). The administrative law judge credited the miner with seven and one-half years of coal mine employment,[2] and adjudicated both claims pursuant to 20 C.F.R. Part 718. The administrative law judge noted that the miner's claim was a subsequent claim filed on February 6, 2002,[3] and found that the newly submitted evidence established a totally disabling respiratory impairment, and thus established one of the elements of entitlement previously adjudicated against the miner pursuant to 20 C.F.R. §725.309(d). Addressing the merits of entitlement, the administrative law judge found that the newer evidence was entitled to greater weight and again found that the evidence established a totally disabling respiratory impairment. However, he further found that the evidence did not establish either the existence of pneumoconiosis or that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge denied benefits on the miner's claim.

With regard to the survivor's claim, the administrative law judge noted that the parties stipulated to the same evidence in both the miner's and survivor's claims, and he incorporated into the survivor's claim his finding that the existence of pneumoconiosis was not established. Decision and Order at 20-21 and n. 12. Additionally, he found that

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[1] Claimant is Callie Harville, the widow of the miner, Rufus C. Harville, who died on July 5, 2002. Director's Exhibits 18, 46. Claimant filed her application for benefits on August 12, 2002. Director's Exhibit 41.

[2] The record indicates that the miner's last coal mine employment occurred in Kentucky. Director's Exhibits 1, 42. 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*).

[3] The miner's first two applications for benefits were denied because he did not establish any element of entitlement. Director's Exhibits 1, 2. The miner filed a third application on July 7, 1994, which was denied by Administrative Law Judge Richard E. Huddleston on August 23, 1996 because the miner did not establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. The Board affirmed Judge Huddleston's denial of benefits. *Harville v. Laurel River Coal Processing*, BRB No. 96-1685 BLA (Aug. 19, 1997)(unpub.); Director's Exhibit 1.

claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence in finding that claimant did not establish that the miner was totally disabled. Additionally, claimant alleges that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis. In response, employer urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs has stated that he will not respond on the merits of claimant's appeal.

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

To be entitled to benefits on the miner's claim under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, 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), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the readings of the x-ray films in light of the readers' radiological qualifications.[4] Decision and Order at 7-8, 9-10. Of the relevant readings, two were read as positive for pneumoconiosis, a "1/0" reading of the March 25, 2002 x-ray film by Dr. Simpao, who has no specialized qualifications for the interpretation of x-rays, and a "2/1" reading of the February 2, 2002 x-ray film by Dr. Alexander, a B reader and Board-certified radiologist. Director's Exhibit 11; Claimant's Exhibits 1, 2. However, the administrative law judge found that the March 25, 2002 film was read as negative by Drs. Spitz and Wiot, who are B readers and Board-certified radiologists. Employer's Exhibit 1, Director's Exhibits 16, 67. He also found that the February 2, 2002 film was read as negative by Drs. Spitz and Wiot. Director's Exhibits 17, 67; Employer's Exhibit 2. Considering these readings, the administrative law judge found that the weight of the evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 9-10, 19. A review of the record shows that the administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3-4. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge should not have rejected the medical opinions of Drs. Baker and Simpao, which claimant contends are supportive of her burden, as their opinions are well reasoned. Claimant's Brief at 5-6. There is no merit to this argument.

Contrary to claimant's contention, the administrative law judge did not reject the medical opinion of Dr. Baker but rather found his opinion was well reasoned and well documented. Decision and Order at 15. Specifically, the administrative law judge found that Dr. Baker diagnosed a moderate restrictive ventilatory defect, moderate resting arterial hypoxemia and chronic bronchitis, but further stated that these conditions were not the result of coal dust exposure. Decision and Order at 14; Director's Exhibits 15, 30 at 8-9. Rather, Dr. Baker stated that he felt that these conditions were secondary to claimant's long history of smoking as well as post-operative changes from his coronary by-pass surgery and esophageal cancer surgery. Director's Exhibit 30 at 8-9. The administrative law judge found this opinion well-reasoned and well-documented and, thus, relied on the report of Dr. Baker in finding that the miner has not established the

[4] Dr. Sargent evaluated the March 25, 2002 x-ray for quality purposes only. Director's Exhibit 13.

existence of pneumoconiosis. Decision and Order at 15. As the administrative law judge found Dr. Baker's opinion well reasoned, we hold that there is no merit to claimant's contention that the administrative law judge erred in rejecting this opinion.

Moreover, the administrative law judge permissibly found that Dr. Simpao's diagnosis of pneumoconiosis did not constitute a documented and reasoned medical opinion because the physician relied primarily upon his own positive x-ray interpretation, which was re-read as negative by a physician with "superior" radiological qualifications. Decision and Order at 14; Director's Exhibit 11; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). As claimant does not otherwise challenge the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement in both the miner's claim and the survivor's claim pursuant to Part 718, we must affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order – Denial of Miner's Benefits and Survivor's Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge