

BRB No. 05-0811 BLA

| | | |
|-------------------------------|---|-------------------------|
| ISOLA PRATER |) | |
| (Widow of DALLAS PRATER) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 04/10/2006 |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Isola Prater, Homer, Michigan, *pro se*.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (04-BLA-6250) of Administrative Law Judge Robert D. Kaplan on 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). Prior to the scheduled hearing, the parties waived, in writing, their right to a hearing and requested a decision on the record. 20 C.F.R. §725.461(a); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). Accordingly, the administrative law judge determined this case on the record. The administrative law judge credited the miner with seven years

and seven months of coal mine employment.¹ The administrative law judge found that claimant did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and consequently, did not 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 appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits.

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. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

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, 1-87-88 (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), (c)(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); *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 Section 718.202(a)(1), the administrative law judge found that the sole positive x-ray interpretation, a "1/1" reading of a March 17, 1987 x-ray by Dr. Martin, was outweighed by two negative readings of an August 8, 1986 x-ray by a Board-

¹ The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibits 1, 3. 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, 1-202 (1989)(*en banc*).

certified radiologist/B-reader and a B-reader.² In so finding, the administrative law judge reasonably considered the August 8, 1986 and March 17, 1987 x-rays to be “essentially contemporaneous” since they were taken within seven months of each other. Decision and Order at 6; *see Taylor v. Director, OWCP*, 9 BLR 1-22, 1-23 (1986). Because all of the other x-ray readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 5, 6. 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). We therefore affirm the administrative law judge’s finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (a)(3), the administrative law judge accurately noted that the record contains no biopsy or autopsy evidence to be considered under subsection (a)(2), and he correctly found that the presumptions under Section 718.202(a)(3) are inapplicable to this claim filed after January 1, 1982 in which there is no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge’s findings that the existence of pneumoconiosis could not be established pursuant to Section 718.202(a)(2), (a)(3).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Martin, Chan, and Hall, the miner’s death certificate, and the hospital records and treatment notes of Drs. Chan, Dawson, Doctor, Larcia, and Owusu. Decision and Order at 4-6. Substantial evidence supports the administrative law judge’s finding that “the record does not contain a creditable opinion that the miner had pneumoconiosis” Decision and Order at 6; *see Stark*, 9 BLR at 1-37.

Specifically, the administrative law judge noted that the miner’s death certificate listed the immediate causes of death as ventricular tachycardia, acute myocardial infarction, and coronary artery disease, and listed anoxic encephalopathy as an additional cause of death. Decision and Order at 5; Director’s Exhibit 4. The record reflects that the death certificate does not mention pneumoconiosis. Director’s Exhibit 4.

Additionally, the administrative law judge considered Dr. Martin’s March 17, 1987 report diagnosing the miner with “1/1 q hi Silicosis,” but permissibly discounted the report because the x-ray Dr. Martin read as “1/1” was outweighed by two negative

² The Director correctly notes that although the administrative law judge considered Dr. Martin to be a B-reader, there is no indication in the record that Dr. Martin is qualified as a B-reader.

readings of the August 8, 1986 x-ray, one of which was by a radiologist with superior credentials to Dr. Martin. See *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). The administrative law judge also considered Dr. Martin's August 1, 2003 letter stating that he had evaluated the miner on March 18, 1987 and had "declared him totally and permanently disabled" by "his Black Lung and or Pneumoconiosis" Director's Exhibit 8. The administrative law judge accurately found that the district director asked Dr. Martin to explain the basis for his diagnosis and to indicate whether he knew the miner's coal mine employment and smoking histories, but that Dr. Martin did not respond to the district director's letter. Director's Exhibit 9; see *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Further, the administrative law judge accurately found that Dr. Chan did not diagnose pneumoconiosis in his September 7, 2003 letter. Director's Exhibit 10. As the administrative law judge found, although Dr. Chan stated that the miner had chronic obstructive airway disease and emphysema, Dr. Chan did not indicate that either disease was related to or aggravated by the miner's dust exposure in coal mine employment. 20 C.F.R. §718.201(b); Decision and Order at 6; Director's Exhibit 10. Finally, substantial evidence supports the administrative law judge's finding that there were no other diagnoses of pneumoconiosis in the record. We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Because we have affirmed the administrative law judge's finding that the evidence did not establish that the miner had pneumoconiosis, an essential element of entitlement in a survivor's claim under Part 718, we must affirm the denial of benefits. See 20 C.F.R. §718.205(a)(1); *Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge