

BRB No. 10-0473 BLA

SHIRLEY A. GIBBS)
(Widow of WINSTON GIBBS, JR.))
)
 Claimant-Petitioner)
)
 v.)
)
 APOGEE COAL COMPANY) DATE ISSUED: 04/06/2011
)
 and)
)
 ARCH OF KENTUCKY, INCORPORATED)
)
 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 on Survivor's Claim Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Shirley A. Gibbs, Partridge, Kentucky, *pro se*.

Ralph D. Carter (Barret, Haynes, May & Carter P.S.C.), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order on Survivor's Claim Denying Benefits (05-BLA-5859) of Administrative Law Judge Robert B. Rae rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).³ The administrative law judge accepted the parties' stipulation that the miner worked in qualifying coal mine employment for twenty-two years. Adjudicating this survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish either the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

In the present appeal, claimant generally challenges the administrative law judge's denial of benefits in her survivor's claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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.⁴ 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).

¹ Claimant, Shirley A. Gibbs, is the widow of the miner, who died on February 26, 2004. Director's Exhibit 6. Claimant filed her survivor's claim for benefits on March 22, 2004. Director's Exhibit 2.

² Jerry Murphree of Stone Mountain Health Services, St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, as he is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

³ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this survivor's claim since it was filed prior to January 1, 2005.

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (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 the cause of the miner's death, where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where the death was caused by complications of pneumoconiosis, or where the irrebuttable presumption of death due to pneumoconiosis is applicable. 20 C.F.R. §718.205(c)(1), (2), and (3). 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).

Relevant to Section 718.202(a)(1), the administrative law judge properly found that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis, since none of the x-rays contained in the miner's treatment records was interpreted as positive for pneumoconiosis, and Dr. Wiot, a Board-certified radiologist and B reader, interpreted x-rays dated July 29, 1992 and September 26, 1995 as negative for pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Langerud v. Director, OWCP*, 9 BLR 1-101, 1-103 (1986); Decision and Order at 15; Director's Exhibits 8, 9, 30; Employer's Exhibits 1, 2. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *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. 1994).

Likewise, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as the record contains no biopsy or autopsy evidence. Similarly, claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3), as none of the presumptions set forth therein is applicable to this case.⁵ Decision and Order at 15.

⁵ A review of the record reveals no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and the instant claim was not filed within the requisite time limitations, *see* 20 C.F.R. §§718.305, 718.306.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that Drs. Caizzi and Jarboe provided narrative medical reports. By letter dated April 27, 2007, Dr. Caizzi, the miner's treating physician, stated that the miner "was diagnosed with Coal Miner's Pneumoconiosis by Dr. Anderson in 1994," and that he "developed cor pulmonale which added to his demise." Claimant's Exhibit 1. Dr. Jarboe reviewed the miner's medical records and a CT scan interpreted by Dr. Wiot as negative for pneumoconiosis. In reports dated January 3, 2005 and February 20, 2005, Dr. Jarboe opined that the miner suffered from severe pulmonary emphysema caused by a history of heavy cigarette smoking, but had no respiratory or pulmonary condition related to coal dust exposure. Director's Exhibit 30. The administrative law judge permissibly accorded little weight to Dr. Caizzi's opinion because he properly found that Dr. Caizzi did not render an independent diagnosis of either clinical or legal pneumoconiosis based on her own assessment of the miner. Further, the administrative law judge determined that Dr. Caizzi's mention of cor pulmonale was undocumented in the records associated with the miner's death and, thus, could not establish the existence of pneumoconiosis. 20 C.F.R. §718.201(a)(2); *see Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); Decision and Order at 15. Hence, the administrative law judge properly concluded that the physicians' opinions of record failed to demonstrate that the miner suffered from either clinical or legal pneumoconiosis. *See Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 12. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4).

Because claimant has failed to satisfy her burden of establishing pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded.⁶ *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

⁶ Claimant's failure to affirmatively establish pneumoconiosis, a requisite element of entitlement, obviates the need to address the administrative law judge's determination that pneumoconiosis was not a substantially contributing cause of the miner's death at Section 718.205(c)(2). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge