

BRB No. 05-0935 BLA

DELLA RUTH HARDING)
(Widow of JAMES MARSHALL HARDING))
)
Claimant-Petitioner)
) DATE ISSUED: 08/14/2006
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

William J. Hackworth, Lay Representative, Lima, Ohio, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ through her lay representative, appeals the Decision and Order on

¹ Claimant is the widow of the miner, James Marshall Harding, who died on July 13, 1989. Director's Exhibits 3, 13. During his lifetime, the miner filed two applications for benefits. The first claim was filed on November 28, 1980 and was denied on February 25, 1981. Director's Exhibit 1. The miner filed a second application for benefits on May 29, 1989, which was denied by the district director on November 13,

Remand – Denial of Benefits (03-BLA-6365) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) on a 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). This case is before the Board for the second time. In his original Decision and Order, the administrative law judge found the instant claim to be a subsequent survivor's claim filed on August 15, 2002.² In addition, the administrative law judge found that because claimant's initial survivor's claim was denied solely on the basis of the miner's physical condition at the time of his death, the instant survivor's claim must be denied, as a matter-of-law, pursuant to 20 C.F.R. §725.309(d)(3). Accordingly, the administrative law judge denied benefits.

Claimant appealed the denial to the Board. In a Decision and Order issued on February 7, 2005, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration. *Harding v. Director, OWCP*, BRB No. 04-0366 BLA (Feb. 7, 2005)(unpub.). Specifically, the Board held that the district director's denial of claimant's initial survivor's claim was based on a finding that the evidence failed to establish that claimant was an eligible survivor under the regulations as well as the findings that claimant failed to establish either the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. *Harding*, slip op. at 3-4. Because the administrative law judge failed to acknowledge that the first survivor's claim was denied because claimant was not an eligible survivor, an element of entitlement not related to the miner's physical condition pursuant to Section 725.309(d)(3), the Board vacated the administrative law judge's denial of this subsequent survivor's claim.

On remand, the administrative law judge found that the issue of whether claimant is an eligible survivor was no longer contested and, therefore, found that claimant established an applicable element of entitlement unrelated to the miner's physical contention and, thus consideration of this subsequent survivor's claim was no longer

1989. Director's Exhibit 2. There is no evidence that any further action was taken on the miner's claim.

² Claimant filed her first application for survivor's benefits on September 23, 1989. Director's Exhibit 3. This claim was denied by the district director based on the findings that the evidence was insufficient to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. *Id.* In addition, the district director found that the evidence was insufficient to establish that claimant is an eligible survivor of the miner. *Id.* No further action was taken on this application. Claimant filed a subsequent survivor's claim on August 15, 2002, and this is the claim currently at issue. Director's Exhibit 5.

precluded pursuant to Section 725.309(d)(3). Decision and Order on Remand at 1. The administrative law judge then adjudicated the claim pursuant to 20 C.F.R. Part 718, and found the evidence established seven years of coal mine employment. Decision and Order on Remand at 3. Addressing the merits of the survivor's claim, the administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Decision and Order on Remand at 6-8. In addition, the administrative law judge found the evidence of record failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order on Remand at 9. Accordingly, the administrative law judge denied benefits.

On appeal, claimant, through a lay representative, contends generally that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis by setting forth the medical evidence supportive of a determination establishing the existence of pneumoconiosis. Claimant also sets forth the evidence supportive of a finding that pneumoconiosis was a substantially contributing cause of the miner's death. Lastly, claimant contends that the record supports a finding of eleven years of coal mine employment under 20 C.F.R. §725.101(a)(32). In response, the Director, Office of Workers Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits.³

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'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 the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it

³ The parties do not challenge the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2)-(3). It is therefore recommended that these findings be affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). 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 x-ray evidence is insufficient to establish the existence of pneumoconiosis. The administrative law judge considered four readings of two x-ray films, of which only Dr. Raval's interpretation of the July 6, 1989 was positive for the existence of pneumoconiosis. Decision and Order on Remand at 6; Director's Exhibit 2; Claimant's Exhibit A3. While noting that Dr. Raval is a Board-certified radiologist and B reader, the administrative law judge nonetheless found this film to be negative for pneumoconiosis based on his determination that Dr. Raval's positive reading is outweighed by the negative readings of this film by Drs. Cole and Sargent, both of whom are also Board-certified radiologists and B readers. Decision and Order on Remand at 6; Director's Exhibit 2. In addition, the administrative law judge found the interpretation of the July 5, 1981 x-ray film by Dr. Smith, who is also dually qualified, to be negative for the existence of pneumoconiosis. Decision and Order on Remand at 6; Director's Exhibit 2.

On appeal, claimant generally contends that the x-ray reports of Drs. Smith, Sargent and Cole should not have been admitted into the record under Section 413(b) of the Act and the regulations. Consequently, claimant contends that the only properly admitted x-ray is the positive interpretation by Dr. Raval and, therefore, that the existence of pneumoconiosis has been established. These contentions lack merit.

Contrary to claimant's contention, the provision barring the Director from obtaining rereadings of certain positive x-ray films submitted by claimant, as contained in Section 413(b) of the Act, is not applicable in this claim as this prohibition is applicable only in claims filed prior to January 1, 1982. Because this survivor's claim was filed on August 15, 2002, the Director is not prohibited from obtaining rereadings of the x-ray films submitted by claimant. 20 C.F.R. §718.202(a)(1)(i); Section 413(b) of the Act, 30 U.S.C. §923(b); *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981). In addition, contrary to claimant's contention, the rereadings by Drs. Sargent and Cole state specifically that they are rereadings of the July 6, 1989 x-ray film. Director's Exhibit 2. Similarly, the rereading by Dr. Smith identifies the original film as being dated January 5, 1981. Director's Exhibit 1. Therefore, we reject claimant's contention that the x-ray rereadings by Drs. Cole, Smith and Sargent are not in accordance with the regulations because there is no indication of what film they reread. Moreover, as claimant does not otherwise challenge the administrative law judge's findings under Section 718.202(a)(1), and the administrative law judge considered both the quality and quantity of the evidence in finding Dr. Raval's positive reading to be outweighed by the negative readings of Drs.

Sargent, Smith and Cole, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order on Remand at 6; *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Pursuant to Section 718.202(a)(4), the administrative law judge set forth the medical opinions of Drs. Shin, Imler and Calandrella, and found that because none of these opinions constituted a reasoned and document medical opinion, the medical opinion evidence is insufficient to establish the existence of pneumoconiosis.⁴ Specifically, the administrative law judge accorded little weight to the opinion of Dr. Shin, which included a diagnosis of coal workers' pneumoconiosis, because Dr. Shin failed to adequately explain his diagnosis and did not state specifically upon what underlying documentation his opinion is based. Decision and Order on Remand at 8; Director's Exhibits 2, 3, 15. Similarly, the administrative law judge accorded little weight to Dr. Imler's opinion because Dr. Imler did not diagnose the existence of coal workers' pneumoconiosis but rather only reported a "history of pneumoconiosis, black lung disease" in his report and the physician did not state upon what evidence this history was based. Decision and Order on Remand at 8; Director's Exhibits 3, 14, 15. With regard to the opinion of Dr. Calandrella, diagnosing the existence of pneumoconiosis, the administrative law judge found that although Dr. Calandrella is claimant's treating physician, his opinion is nonetheless accorded little weight because Dr. Calandrella does not include the underlying documentation he relied upon in support of his conclusion. Decision and Order on Remand at 8; Director's Exhibits 2, 13. In addition, the administrative law judge found that the hospitalization and treatment notes do not support a finding of pneumoconiosis because there is no reference or diagnosis of any condition that could be construed as pneumoconiosis. Decision and Order on Remand at 8; Director's Exhibits 3, 15. Consequently, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Within a reasonable exercise of his discretion, the administrative law judge accorded little weight to the opinion of Dr. Calandrella, the miner's treating physician, because Dr. Calandrella did not provide any support or documentation for his diagnosis

⁴ The record contains additional medical opinions associated with the prior miner's claims, *see* Director's Exhibits 1, 2. These opinions, however, were not included on the parties' "Evidence Summary Form" as either affirmative evidence or rebuttal evidence pursuant to 20 C.F.R. §725.414; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

of pneumoconiosis.⁵ Decision and Order on Remand at 8; Director's Exhibits 2, 13; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, the administrative law judge rationally accorded little weight to Dr. Shin's diagnosis of pneumoconiosis because the physician did not adequately explain his diagnosis in light of the objective evidence nor did Dr. Shin state specifically what underlying documentation he relied upon in rendering his diagnosis. Decision and Order on Remand at 8; Director's Exhibits 2, 3, 15; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark*, 12 BLR 1-149.

In addition, we affirm the administrative law judge's finding that the opinion of Dr. Imler is insufficient to establish the existence of pneumoconiosis because the physician only noted a history of the disease and did not provide a specific diagnosis nor did Dr. Imler provide any explanation as to upon what evidence this conclusion was based. Decision and Order on Remand at 8; Director's Exhibits 3, 14, 15; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Clark*, 12 BLR 1-149. Moreover, because claimant does not otherwise allege any specific error with the administrative law judge's weighing of the relevant medical evidence, but merely sets forth evidence supportive of her burden, we affirm the administrative law judge's finding that claimant failed to establish that the existence of pneumoconiosis pursuant to Section 718.202(a)(4). See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement in a survivor's claim under Part 718, an award of benefits is precluded. *Trumbo*, 17 BLR at 1-87-88. Therefore, we need not address claimant's other arguments regarding the cause of the miner's death or the length of the miner's coal mine employment. See generally *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵ Dr. Calandrella submitted a one page letter dated March 5, 1981, stating that he was the miner's treating physician and that the miner had chronic pneumoconiosis and pulmonary fibrosis. Director's Exhibits 2, 13. This letter, however, did not include any reference to the objective evidence or documentation upon which the physician based his opinion. *Id.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge