BRB No. 07-0977 BLA

O.L. (Widow of B.L.) Claimant-Petitioner v. KENTUCKY ELKHORN COAL, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/26/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-5591) of Administrative Law Judge Adele Higgins Odegard on a survivor's claim[1] 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 found that the evidence of record established a coal mine employment history of eighteen years. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence failed to establish either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, the administrative law judge found that because clinical pneumoconiosis was not established, she could not find claimant entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that, as the evidence failed to establish pneumoconiosis, she could not conclude that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find legal pneumoconiosis established by the medical opinion evidence under Section 718.202(a)(4) and in failing to find that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,[3] they are binding upon this Board and

[1] Claimant is the widow of the miner, who died on October 20, 2004. The miner's claim for benefits, filed on March 23, 1980, was finally denied by Administrative Law Judge Frank H. Itkin because the evidence failed to establish pneumoconiosis or total disability. No further action was taken on the miner's claim and it is not before the Board.

[2] We affirm the administrative law judge's length of mine employment finding and the finding that the evidence failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) since these determinations were unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983). We further affirm, as unchallenged, the administrative law judge's finding that the evidence did not establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack*, 6 BLR at 1-711.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (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).

In challenging the administrative law judge's determination that legal pneumoconiosis was not established pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in failing to fully consider the medical opinion of Dr. Baker, who diagnosed the presence of chronic obstructive pulmonary disease arising, in part, from coal mine dust exposure. Claimant additionally contends that Dr. Baker's opinion is supported by the opinion of Dr. Gibson, who was the miner's treating physician for twenty-two years. Claimant contends that the administrative law judge erred in relying on the opinions of Drs. Rosenberg and Vuskovich, that the miner did not have legal pneumoconiosis, as Dr. Baker, the only physician who examined the miner shortly before he died, reviewed the opinions of these physicians and disagreed with them.

The administrative law judge did not err in according little weight to the opinion of Dr. Baker. In assessing the credibility of Dr. Baker's opinion, the administrative law judge found that the doctor diagnosed chronic obstructive pulmonary disease arising out of both the miner's long history of coal mine employment and extensive smoking history. The administrative law judge found, however, that Dr. Baker failed to point to any objective test results that supported his opinion that the miner's chronic obstructive pulmonary disease was related, in part, to his coal mine dust exposure. Consequently, the administrative law judge properly found that Dr. Baker's opinion as to the etiology of the miner's chronic obstructive pulmonary disease was entitled to little weight. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek*

Collieries v. Director, OWCP [Stephens], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 1-62, 1-175 (4th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Further, we hold that the administrative law judge did not err in according little weight to the opinion of Dr. Gibson, despite his status as the miner's treating physician.[4] In assessing the credibility of Dr. Gibson's opinion, the administrative law judge found that the nature and duration of Dr. Gibson's relationship with the miner, as well as the frequency of his treatment, justified according additional weight to the physician's opinion. Nevertheless, the administrative law judge found that the doctor's treatment notes did not indicate that he administered extensive testing to the miner, nor did the doctor indicate that he based his opinion on objective test results. Rather, the administrative law judge found that Dr. Gibson based his opinion on "mere observation and…history of coal mine exposure." Decision and Order at 18-19. Accordingly, because the administrative law judge found that Dr. Gibson's opinion was not based on "objective medical evidence" in addition to medical and work histories, she properly found that it was not well-reasoned and was therefore entitled to little weight. 20 C.F.R. §718.202(a)(4); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003) (the opinions of treating physicians get the deference they deserve based on their power to persuade); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (administrative law judge as fact-finder should decide whether physician's report is sufficiently reasoned and documented); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR 1-at 1-88-89 (1993).

Since the administrative law judge rationally determined that the opinion of Dr. Gibson was undermined because it was not well-reasoned, Dr. Gibson's opinion was not entitled to determinative weight based on his status as the miner's treating physician. 20

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[4] Section 718.104(d)(5) provides in pertinent part that:

> [i]n appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation….

20 C.F.R. §718.104(d)(5).

C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003) (noting that Section 718.104(d) does not call for automatic acceptance of treating physician's opinion); *Williams*, 338 F.3d at 510-511, 22 BLR at 2-641-642; *Groves*, 277 F.3d at 834, 22 BLR at 2-326. We, therefore, affirm the administrative law judge's determination to accord little weight to the opinion of Dr. Gibson.

Lastly, the administrative law judge permissibly accorded significant weight to the opinion of Dr. Rosenberg, that the miner did not have pneumoconiosis, because she found that the doctor offered the best reasoned and documented opinion of record, as it was supported by the results of testing and the doctor fully explained why he believed that the miner's pulmonary impairment was due to smoking and not coal mine employment. Decision and Order at 18; Employer's Exhibits 2-4; *Stephens*, 298 F.3d at 522, 22 BLR at 2-511; *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). We, therefore, affirm the administrative law judge's finding that claimant did not establish legal pneumoconiosis by the medical opinion evidence pursuant to 20 C.F.R. §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.[5] *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*).

[5] Claimant's failure to establish pneumoconiosis, a requisite element of entitlement, obviates the need to address her argument as to whether pneumoconiosis was 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 Denying Benefits of the administrative law judge 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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BETTY JEAN HALL
Administrative Appeals Judge