BRB No. 98-1568 BLA

MARGARET A. HESKEY (Widow of ROBERT P. HESKEY)	)	
Claimant-Petitioner	)	
v.	)	
CONSOLIDATED RAIL CORPORATION	)	DATE ISSUED: 8/13/99
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ronald J. Zera, Greensburg, Pennsylvania, for claimant.

J. Lawson Johnston (Dickie, McCamey & Chilcote), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] the miner's widow, appeals the Decision and Order (97-BLA-1519) of Administrative Law Judge Richard A. Morgan denying benefits on claims filed by the miner and the survivor 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 employer was the responsible operator and that claimant established at least five years of qualifying coal mine employment. Considering entitlement in both the miner's and survivor's claims pursuant to 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), but insufficient to establish the existence of pneumoconiosis, that the miner's total disability was due to pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b) and 718.205. Accordingly, benefits were denied in both the miner's and survivor's claims. On appeal, claimant contends that the administrative law judge erred in weighing the evidence of record pursuant to Sections 718.202(a) and 718.205. Employer responds urging affirmance of the administrative law judge's Decision and Order and asserting that it is not the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.

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 applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the

[1]Claimant is Margaret A. Heskey, the miner's widow. The miner, Robert P. Heskey, filed a claim for benefits on August 21, 1995, which was denied on August 13, 1996. Director's Exhibits 1, 44. The miner died on March 20, 1996 and claimant filed a survivor's claim on April 9, 1996, which was denied on October 2, 1996. Director's Exhibits 2, 15, 45. Claimant subsequently requested a hearing on both claims. Director's Exhibit 60.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), requiring that all types of evidence enumerated by the four distinct methods of Section 718.202(a) be weighed together to determine if the miner suffers from the disease.[2]

[2]Claimant asserts that the Director conceded the existence of pneumoconiosis.

Claimant's Brief at 1. Contrary to claimant's statement, the Director only conceded that the x-ray evidence was positive for pneumoconiosis. July 27, 1998 Brief at 8; Director's Brief at 2. Moreover, the Director's concession in regard to the x-ray evidence in this instance does not bind the administrative law judge as employer continued to contest the existence of pneumoconiosis and the administrative law judge was required to weigh all the relevant evidence together to determine if the disease was present. Director's Exhibit 62; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence in determining that pneumoconiosis was not established. Claimant's Brief at 2. In the instant case, the administrative law judge considered the x-ray evidence and noted that there were four readings of three x-rays in the record and that two of these readings were positive and that the other two were negative for the existence of pneumoconiosis. The administrative law judge further noted that the record contained three CT scans which revealed some form of idiopathic pulmonary fibrosis, but did not mention coal workers' pneumoconiosis.[3] Decision and Order at 5-6, 24-25; Director's Exhibits 32-38. The administrative law judge then considered the entirety of the medical opinion evidence of record and properly noted that Dr. DeMezza was the miner's treating physician, but concluded that the opinions of Drs. Kucera, Wodzinski and Spagnolo, who opined that the miner's idiopathic pulmonary fibrosis was unrelated to coal dust exposure, were entitled to greater weight. Decision and Order at 25-26; Director's Exhibits 22-24, 26, 27, 54, 65. The administrative law judge then concluded that in spite of the two positive x-ray readings, the evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 26; *Williams, supra*.

The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Contrary to claimant's contention, in weighing the medical opinion evidence of record and finding it insufficient to establish the existence of pneumoconiosis, the administrative law judge permissibly relied on the opinions of Drs. Kucera, Wodzinski and Spagnolo, who are Board-certified in internal medicine with a subspecialty in pulmonary medicine, opining that the miner suffered from idiopathic pulmonary fibrosis unrelated to coal dust or coal mine employment. Decision and Order at 25-26; Director's Exhibits 23, 27, 65. In so finding, the administrative law judge, within his discretion as fact-finder, rationally accorded significant weight to the opinions of Drs. Kucera, Wodzinski and Spagnolo on the basis of their qualifications, the documentation and reasoning contained in their reports and as supported by the objective evidence of record. *See Worhach v. Director, OWCP*, 17 BLR 1-105

[3]The administrative law judge properly determined that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) as there is no autopsy or biopsy evidence of record and the presumptions set forth at Section 718.202(a)(3) are not applicable as the miner filed his claim after January 1, 1982, there is no evidence of complicated pneumoconiosis in the record and the miner did not die before March 1, 1978. *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304; 718.305, 718.306; Decision and Order at 24; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

(1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 25-26. In addition, the administrative law judge also acted within his discretion in according less weight to the opinion of Dr. DeMezza, the miner's treating physician, since the physician's qualifications are unknown and as the physician's opinion is not well reasoned since he relies on a positive x-ray interpretation that is not in the record and his opinion does not set forth any other objective testing in reaching his result. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark, supra; Fields, supra; Wetzel, supra; Lucostic, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.[4] *Williams, supra.*

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[4]On appeal, claimant challenges the administrative law judge's findings made pursuant to 20 C.F.R. §718.205. Claimant's Brief at 1-2. As the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) is affirmed, we need not address the administrative law judge's findings at Section 718.205 or claimant's arguments thereunder. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in both a miner's claim and a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded.[5] *See Lukosevicz, supra; Trumbo*, *supra*; *Kneel v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Trent*, *supra*; *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry*, *supra*.

[5]Employer contends that the administrative law judge erred in determining that the miner was a coal miner within the meaning of the Act and that it is the responsible operator. Employer's Brief at 2. We need not address employer's contentions as we have affirmed the administrative law judge's denial of benefits on the merits. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249 (1990).

Accordingly, the administrative law judge's Decision and Order denying benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge