BRB No. 08-0196 BLA

T.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COASTAL STATES ENERGY COMPANY	)	DATE ISSUED: 12/23/2008
	)	
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 – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph W. Justice, Pikeville, Kentucky, for claimant.

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

Rita Ropollo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2006-BLA-5888) of Administrative Law Judge Larry S. Merck (the administrative law judge) 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).[1] The administrative law judge accepted the parties' stipulation to ten years of qualifying coal mine employment, and adjudicated this claim, filed on August 25, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant contends that the weight of the autopsy evidence is sufficient to establish the existence of pneumoconiosis, and that the administrative law judge erred in finding the two autopsy reports of record to be in equipoise at 20 C.F.R. §718.202(a)(2).[2] Employer has responded, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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.[3] 33 U.S.C. §921(b)(3), as incorporated 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 survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *see also Griffith v. Director, OWCP*, 49 F.3d

[1] Claimant is the widow of the miner, who died on June 2, 2005.

[2] The administrative law judge's finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3), (4) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3, 15.

184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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 is supported by substantial evidence, consistent with applicable law, and must be affirmed. At Section 718.202(a)(2), claimant asserts that the autopsy protocol of Dr. Dennis consists of four single spaced pages that fully chronicle the physician's findings, while Dr. Caffrey's report consists of cursory descriptions of the autopsy slides within three paragraphs. Claimant thus contends that the conflicting reports are not equally balanced. Claimant also maintains that Dr. Dennis's opinion merits greater weight because Dr. Dennis is routinely requested to perform autopsies by the hospital, whereas Dr. Caffrey routinely performs reviews of slides for rebuttal reports at the request of employers. Claimant's arguments are without merit. The length of a pathologist's report describing his findings is not relevant to the administrative law judge's analysis of the quality of the physician's reasoning. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Further, claimant does not identify, nor does the record reveal, any evidence of bias on the part of Dr. Caffrey. *See Urgolites v. BethEnergy Mines Inc.*, 17 BLR 1-20 (1992).

We also reject claimant's assertion that Dr. Caffrey's opinion is entitled to little weight on the ground that the physician did not review all of Dr. Dennis's autopsy slides, specifically, the stained slides that went to the heart of Dr. Dennis's diagnosis of pneumoconiosis. *See* Director's Exhibit 10; Employer's Exhibit 5 at 25. We note initially that claimant has the burden to provide evidence and establish her own entitlement to benefits. While Dr. Caffrey's report and deposition testimony indicated that the seventeen slides that he received did not contain any of the iron stains or Masson's trichrome stains referenced by Dr. Dennis, and claimant maintains that there should have been a total of at least twenty-three or twenty-four slides, the record does not support claimant's assertion. Dr. Dennis did not state the number of slides that he prepared, and an accurate count thereof cannot be made from the physician's narrative description of his findings in the autopsy report. Moreover, assuming *arguendo* that Dr. Caffrey was not provided with all of the autopsy slides, despite employer's request for same, claimant's failure to raise the issue at the hearing or otherwise seek to correct the situation below resulted in the issue being waived. *Cf. Johnson v. Royal Coal Co.*, 22 BLR 1-132 (2002); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995).

In considering the autopsy evidence at Section 718.202(a)(2), the administrative law judge accurately summarized the report of the autopsy prosector, Dr. Dennis, finding moderate to severe black lung disease with progressive massive fibrosis, asbestosis and mesothelial sarcoma, and the rebuttal autopsy report and deposition testimony of Dr.

Caffrey, finding a primary malignancy of the lungs but no pneumoconiosis or other occupational disease. Decision and Order at 7-8. While noting that Dr. Caffrey disagreed with Dr. Dennis's conclusions and pointed out various inaccuracies and inconsistencies in Dr. Dennis's gross and microscopic descriptions, the administrative law judge determined that both physicians were pathologists, and that both provided well-reasoned and documented opinions that were entitled to equal weight. Decision and Order at 8; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Because the administrative law judge concluded that it was not possible for him to determine which expert was correct based solely on the autopsy reports, the administrative law judge acted within his discretion in finding that the autopsy evidence was equally balanced, and that claimant had failed to meet her burden of establishing the existence of pneumoconiosis at Section 718.202(a)(2) by a preponderance of the evidence. Decision and Order at 8; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). As substantial evidence supports the administrative law judge's findings pursuant to Section 718.202(a)(2), they are affirmed.

Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a) precludes entitlement to benefits. *See Trumbo*, 17 BLR 1-85. Consequently, we affirm the administrative law judge's denial of survivor's benefits.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge