BRB No. 08-0375 BLA

B.B. (Widow of W.B.) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 12/08/2008 DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (05-BLA-5211) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits 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). The administrative

[1] Claimant is the widow of the deceased miner. The miner filed a claim on February 26, 1982. It was finally denied on May 5, 1987. He died on July 6, 1992. Director's Exhibit 9. Claimant filed her survivor's claim on December 1, 2003. Director's Exhibit 2.

law judge credited the miner with "in excess of twenty-five years of coal mine employment,"[2] Decision and Order at 3, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.[4]

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

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Claimant initially contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R.

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[2] The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The administrative law judge found that the issue of whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) was moot, as claimant failed to establish that the miner suffered from pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

[4] Because the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§718.202(a)(1). Specifically, claimant argues that the administrative law judge should have given greater weight to Dr. Brandon's positive reading of the October 21, 1981 x-ray, because Dr. Brandon is a B reader and his reading of this x-ray was not disputed by other physicians. The administrative law judge considered the three interpretations of three x-rays dated October 21, 1981, April 21, 1982, and May 14, 1982.[5] Of the three x-ray interpretations, one reading was positive for pneumoconiosis, Director's Exhibit 26, and two readings were negative for pneumoconiosis, Director's Exhibits 38, 43. Dr. Brandon, who is a B reader, read the October 21, 1981 x-ray as positive for pneumoconiosis. Director's Exhibit 26. Dr. Quillen, who is dually qualified as a B reader and a Board-certified radiologist, read the April 21, 1982 x-ray as negative for pneumoconiosis. Director's Exhibit 43. Dr. Cole, who is dually qualified as a B reader and a Board-certified radiologist, read the May 14, 1982 x-ray as negative for pneumoconiosis. Director's Exhibit 38. After considering both the quantitative and qualitative nature of the conflicting x-rays, the administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *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. 1993). In this case, the administrative law judge properly accorded greater weight to the negative x-ray readings by physicians who were B readers and Board-certified radiologists.[6] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, like Dr. Brandon's positive reading of the October 21, 1981 x-ray, the negative readings by Dr. Quillen and Dr. Cole of the April 21, 1982 and May 14, 1982 x-rays, respectively, were not disputed by other physicians. Thus, we reject claimant's assertion that the administrative law judge should have given greater weight to Dr. Brandon's positive reading of the October 21, 1981 x-ray. *Staton*, 65 F.3d at 59, 19

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[5] The administrative law judge noted that "[w]hile there are numerous chest x-ray readings which were taken while the [m]iner was receiving treatment, those x-rays make no mention of the disease." Decision and Order at 8. The administrative law judge additionally noted that "[w]hile Dr. Nash indicates in his report that there is a positive x-ray reading, he is not a B-reader, and more significantly, the specifics of the x-ray reading is not in the record." *Id.*

[6] The administrative law judge stated that "the one positive reading was rendered by a B-reader while the two negative readings were rendered by B-readers who are also [B]oard-certified radiologists." Decision and Order at 8.

BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Further, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Nash, Castle, and Jarboe.[7] Dr. Nash opined that claimant has stage 2 pneumoconiosis.[8] Director's Exhibit 26. By contrast, Drs. Castle and Jarboe opined that claimant does not have pneumoconiosis. Director's Exhibits 36, 37. The administrative law judge found that Dr. Nash's diagnosis of stage 2 pneumoconiosis was unsupported. Decision and Order at 9. The administrative law judge also found that the opinions of Drs. Castle and Jarboe were better reasoned and documented than Dr. Nash's contrary opinion. Consequently, the administrative law judge found that the medical opinion evidence did not establish the existence of pneumoconiosis.

Claimant asserts that the administrative law judge should have accorded greater weight to Dr. Nash's opinion because he was the only doctor who examined claimant. Contrary to claimant's assertion, the Sixth Circuit has held that an administrative law judge is not required to accord greater weight to the opinion of an examining physician. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). Rather, the Sixth Circuit indicated that an administrative law judge must critically analyze the documentation and reasoning of the opinion of an examining physician before according it enhanced weight. *Napier*, 301 F.3d at 712, 22 BLR at 2-551. In this case, the administrative law judge found that Dr. Nash's diagnosis of stage 2 pneumoconiosis was not supported by the underlying documentation. The administrative law judge specifically stated:

> While a diagnosis of pulmonary pneumoconiosis Stage II is made by Dr. Nash, how this diagnosis is reached is not made clear. Dr. Nash refers to a chest x-ray, however, the specifics of that x-ray, including by whom it was taken, who read the x-ray, and the quality of the x-ray, do not appear to be of record in the widow's claim.

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[7] The administrative law judge noted that the medical treatment records did not mention pneumoconiosis. Decision and Order at 5-6.

[8] Although Dr. Nash diagnosed chronic obstructive pulmonary disease, he did not render an opinion regarding the cause of this condition. Director's Exhibit 26.

Decision and Order at 9. Thus, because the administrative law judge acted within his discretion in discrediting Dr. Nash's diagnosis of pneumoconiosis, *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983), we reject claimant's assertion that the administrative law judge should have accorded greater weight to Dr. Nash's opinion because he was the only doctor who examined claimant. Further, because the administrative law judge properly discredited the only medical opinion of record that could support a finding of pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-88.

Accordingly, the administrative law judge's Decision and Order denying benefits 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