BRB No. 08-0390 BLA

S.C. (o/b/o and Widow of C.C.) Claimant-Petitioner v. NATS CREEK MINING COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/23/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S.C., Garrett, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant appeals,[1] without the assistance of counsel, the Decision and Order Denying Benefits (2006-BLA-05388 and 2006-BLA-05389) of Administrative Law Judge Jeffrey Tureck rendered on a miner's claim and 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). Adjudicating the case pursuant to 20 C.F.R. Part 718, the administrative law judge found that employer stipulated to thirty-six years of coal mine employment. In addition, the administrative law judge found that Nats Creek Mining Company (employer) was the properly designated responsible operator, as the last employer for whom the miner worked for at least one full year. Addressing the merits of entitlement in the miner's claim, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits in the miner's claim.

With regard to the survivor's claim, the administrative law judge found the miner's death certificate and the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis contributed to, or hastened, the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits in both the miner's claim and the survivor's claim. In response, employer urges affirmance of the administrative law judge's denial of benefits in both claims, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response in claimant's appeal, unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance

[1] Claimant is the widow of the miner, C.C., who died on March 17, 2005. Director's Exhibit 53. This case encompasses the consolidation of the miner's claim filed on October 15, 2002, Director's Exhibit 2, and the survivor's claim filed on April 27, 2005, Director's Exhibit 44.

with law.[2] 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 benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement in the miner's claim. *Trent*, 11 BLR at 1-27.

Because the survivor's claim was filed after January 1, 1982, claimant must establish that the miner suffered from 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. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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 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 in the survivor's claim.

Miner's Claim

In finding the medical evidence insufficient to establish the existence of pneumoconiosis in the miner's claim, the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Initially, the administrative law judge found that the record contains the interpretations of numerous x-ray films taken during the miner's hospitalizations. Director's Exhibits 42, 56; Claimant's Exhibit 5; Employer's Exhibit 6. The administrative law judge found that the majority of these interpretations, while noting the presence of chronic obstructive pulmonary disease (COPD), were not classified under the ILO-U/C classification system nor did they otherwise provide an opinion regarding the presence of pneumoconiosis, with the exception of the interpretation of a March 9, 2005

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 45.

x-ray by Dr. Sola, wherein he stated that there were interstitial changes which "can also be from black lung." Decision and Order at 4; Director's Exhibit 56. The administrative law judge, however, reasonably found that this interpretation was not probative because Dr. Sola did not set forth his findings under the ILO-U/C classification system, as required by the regulations. 20 C.F.R. §718.102; Decision and Order at 4.

With regard to the x-ray interpretations that are set forth under the ILO-U/C classification system, the administrative law judge considered the interpretations of the November 27, 2002, August 7, 2003 and March 14, 2005 x-rays.[3] The November 27, 2002 x-ray was read as positive for pneumoconiosis by Dr. Miller, a B reader and Board-certified radiologist, but read as negative for pneumoconiosis by Dr. Kendall and Dr. Wiot, both of whom are also dually-qualified radiologists. Director's Exhibits 11, 42; Claimant's Exhibit 4. The August 7, 2003 x-ray was read as positive for pneumoconiosis by Dr. Sundaram, who possesses no specialized radiological qualifications, whereas Dr. Wiot reread this x-ray as negative for pneumoconiosis. Director's Exhibits 13, 42. Dr. Wiot also read the March 14, 2005 x-ray film as negative for pneumoconiosis. Employer's Exhibit 1.

Weighing the relevant x-ray evidence, in light of the readers' qualifications, the administrative law judge reasonably accorded the negative interpretations provided by Dr. Wiot greatest weight, based on his superior radiological qualifications, *inter alia*, as a dually-qualified radiologist and also a Professor of Radiology for thirty-two years. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-280-281 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 4; Director's Exhibit 42; Employer's Exhibit 1. Consequently, because the administrative law judge provided a rational qualitative analysis of the x-ray evidence of record, we affirm his finding that the x-ray evidence is negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

In addition, the administrative law judge reasonably found that none of the pathology evidence, consisting of a March 11, 2002 bronchoscopy with bronchial

[3] The administrative law judge incorrectly identified the x-ray reading by Dr. Wiot contained in Employer's Exhibit 1 to be of a March 9, 2005 x-ray film. Decision and Order at 4. However, a review of the record, and employer's Evidence Summary Form, establishes the date of the x-ray film to be March 14, 2005. Employer's Exhibit 1. This error is harmless, however, because the administrative law judge's description of Dr. Wiot's reading as negative is accurate. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

alveolar lavage and a cell block sputum analysis, diagnosed the presence of pneumoconiosis. Decision and Order at 4; Director's Exhibit 42. Consequently, we affirm the administrative law judge's finding that the pathology evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(2).[4] 20 C.F.R. §718.202(a)(2).

Pursuant to Section 718.202(a)(4), the administrative law judge found the CT scan evidence and medical opinion evidence insufficient to establish the existence of pneumoconiosis. The administrative law judge reasonably found that neither the March 7, 2002 CT scan nor the January 18, 2005 CT scan diagnosed, or mentioned, the presence of pneumoconiosis and, therefore, these studies are insufficient to support a finding of pneumoconiosis. Decision and Order at 5; Director's Exhibit 42; Claimant's Exhibit 5. Moreover, the administrative law judge found the treatment notes and hospitalization records do not contain a diagnosis of pneumoconiosis or establish that the miner's COPD, the only diagnosed chronic respiratory condition, was attributable to his coal mine employment. Decision and Order at 5.

With regard to the specific medical opinions submitted in support of the miner's claim, the administrative law judge found that the medical opinions supportive of claimant's burden, those of Drs. Mettu, Sundaram and Verma, are not credible and, are therefore, of no probative value because the physicians failed to adequately explain their diagnosis of pneumoconiosis in light of the underlying documentation. Decision and Order at 5-6. In addition, the administrative law judge found that the remaining medical opinions of record, the reports and deposition testimony of Drs. Dahhan and Fino, do not "aid the claimant's case" because they conclude that the miner did not suffer from pneumoconiosis or any other respiratory or pulmonary condition related to his coal mine employment. Decision and Order at 6. Consequently, the administrative law judge found that the record does not contain a probative diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4).

Based on a review of the record and the administrative law judge's findings, we affirm his findings that the medical opinions of Drs. Mettu, Sundaram and Verma are not

[4] In addition, claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) because none of the presumptions set forth therein is applicable in this claim. 20 C.F.R. §718.202(a)(3). The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the miner's claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 2. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

probative and, therefore insufficient to support claimant's burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge, within a reasonable exercise of his discretion, concluded that Dr. Mettu did not adequately explain his diagnosis of chronic bronchitis due to the miner's coal mine employment and smoking history, in light of its underlying documentation, which included a negative x-ray and the absence of any pulmonary function study.[5] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 5; Director's Exhibit 11; Claimant's Exhibit 6 at 7-9.

In addition, the administrative law judge reasonably found the medical opinion of Dr. Sundaram not credible and, therefore, of no probative value because the physician did not adequately explain his diagnosis of clinical and legal pneumoconiosis, other than to note his own positive reading of the August 7, 2003 x-ray, whereas the film was reread as negative by a physician with superior radiological credentials, and the miner's history of coal mine employment. *Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 6; Director's Exhibits 13, 42. Likewise, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that the opinion of Dr. Verma that he was treating the miner for COPD "most likely … due to his coal workers' pneumoconiosis," is not probative. The administrative law judge noted that Dr. Verma did not provide an explanation for his conclusions, other than to rely on Dr. Sundaram's diagnosis of coal workers' pneumoconiosis, which the administrative law judge found to be a no probative value. *Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103*; see also 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). Accordingly, because the administrative law judge reasonably considered the evidence supportive of claimant's burden of proof and found that it is not probative, we affirm the administrative law judge's finding that the record does not contain a probative diagnosis of pneumoconiosis and, thus, claimant has not

[5] Dr. Mettu stated in his October 24, 2006 deposition that in order to make a diagnosis of pneumoconiosis, in addition to a history of coal dust exposure, one would have to have a physical examination, which can be either normal or abnormal, and also pulmonary function studies, blood gas studies and a chest x-ray. Claimant's Exhibit at 7. However, Dr. Mettu stated that one could still make a diagnosis of pneumoconiosis without a positive x-ray, because "the chest x-ray could be negative; still they could have abnormal pulmonary function studies and the pulmonary impairment due to coal dust exposure." Claimant's Exhibit at 8.

carried her burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement in a miner's claim under Part 718, entitlement to benefits in the miner's claim is precluded. *Hill*, 123 F.3d at 415-16, 21 BLR at 2-196-197; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Survivor's Claim

With regard to the survivor's claim, we affirm the administrative law judge's denial of benefits as supported by substantial evidence. Pursuant to Section 718.205(c), the administrative law judge considered the miner's death certificate, the medical opinions of Drs. Mettu, Dahhan and Fino, as well as the miner's hospital records and treatment notes, and found that there is "no evidence, credible or otherwise, that the miner's death was in any way due to pneumoconiosis." Decision and Order at 6.

In finding that the record did not contain evidence supportive of claimant's burden at Section 718.205(c), the administrative law judge found that the death certificate attributed the miner's death to cardio-respiratory arrest due to pneumonia and "COPD." Decision and Order at 6. The death certificate is therefore insufficient, standing alone, to establish that the miner's death was due to pneumoconiosis, as the document contains no explanation of the cause of the "COPD" listed as the cause of the cardio-respiratory arrest, which led to the miner's death. *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 6; Director's Exhibit 53. Moreover, substantial evidence supports the administrative law judge's finding that the medical records and hospital treatment notes are insufficient to support a finding that the miner's death was related to pneumoconiosis because these records do not include a diagnosis of pneumoconiosis or any other conditions related to his coal mine employment, nor do they provide a contemporaneous medical opinion relating to the miner's death. Decision and Order at 6; Director's Exhibits 42, 56; Claimant's Exhibit 5; Employer's Exhibit 6. The administrative law judge also reasonably found that the deposition testimony of Dr. Mettu, the only evidence submitted on claimant's behalf that addressed the cause of the miner's death, was insufficient to establish entitlement because Dr. Mettu "could not even conclude that the miner's death was related to his COPD, let alone that it was related to pneumoconiosis."[6] Decision and Order at 6; Claimant's Exhibit 6 at 19-20.

[6] In his deposition testimony, Dr. Mettu, in response to a question regarding whether COPD was a contributing factor in the miner's death, stated that "[t]hat is a

Consequently, because the administrative law judge found that the record contains no evidence supportive of claimant's burden, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-217 (6th Cir. 1995); *Brown*, 996 F.2d at 817, 17 BLR at 2-140.

Since claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c), an essential element of entitlement to benefits in a survivor's claim under Part 718, an award of benefits is precluded on that claim. *Trumbo*, 17 BLR at 1-87-88.

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

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general statement but I can't tell you because the person who took care of the patient would be able to know." Claimant's Exhibit 6 at 20.