BRB No. 08-0468 BLA

P. J. (Widow of D. J.) Claimant-Petitioner v. DIXIE LEE COAL COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/25/2009 DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

P. J., Weeksbury, Kentucky, *pro se.*

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, without the assistance of counsel, the Decision and Order-Denial of Benefits (06-BLA-0023, 06-BLA-5264) of Administrative Law Judge Thomas F. Phalen, Jr., (the administrative law judge) 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).[1] The miner's claim,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

filed on June 24, 1987, has a lengthy procedural history and is now being considered pursuant to the miner's fourth request for modification, pursuant to 20 C.F.R. §725.310 (2000).[2]

In a Decision and Order issued on September 27, 1999, the administrative law judge addressed the miner's third modification request. The administrative law judge found that new evidence established that the miner had become totally disabled by a respiratory impairment and thereby demonstrated a change in conditions since the previous decision denying benefits. *See* 20 C.F.R. §725.310 (2000); Director's Exhibit 116. However, upon review of the entire record, the administrative law judge found that the evidence did not establish that the miner suffered from pneumoconiosis or that his total disability was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Pursuant to the miner's appeal, the Board affirmed the denial of benefits, and summarily denied the miner's motion for reconsideration. [*D.J.*] *v. Dixie Lee Coal Co*., BRB No. 00-0159 BLA (Oct. 18, 2000)(unpub.); [*D.J.*] *v. Dixie Lee Coal Co*., BRB No. 00-0159 BLA (May 18, 2001)(Order)(unpub.).

The miner timely requested modification, which the district director denied on February 14, 2002, and again, after the development of additional evidence, on May 29, 2003. Director's Exhibits 140, 159. The miner timely requested a hearing. Before a hearing could be held, the miner died, on June 17, 2004, and claimant filed her survivor's claim on July 21, 2004. Director's Exhibit 172. Following the denial of her claim, claimant timely requested a hearing and the two claims were consolidated for the hearing.

In a Decision and Order-Denial of Benefits that is the subject of this appeal, the administrative law judge credited the miner with fourteen years of coal mine employment.[3] Considering the records of the two claims separately, the administrative

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[2] The Board previously summarized the history of the miner's claim. [*D.J.*] *v. Dixie Lee Coal Co*., BRB No. 00-0159 BLA (Oct. 18, 2000)(unpub.); [*D.J.*] *v. Dixie Lee Coal Co*., BRB No. 96-1465 BLA (July 31, 1997)(unpub.); [*D.J.*] *v. Dixie Lee Coal Co*., BRB No. 93-0168 BLA (May 24, 1994)(unpub.).

[3] The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibits 173, 174. Accordingly, the Board will apply the law of

law judge first addressed the miner's request for modification.[4] The administrative law judge found that the new evidence submitted with the modification request did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and thus did not establish a change in conditions. *See* 20 C.F.R. §725.310 (2000). Further, the administrative law judge found that a review of the entire record did not demonstrate a mistake of fact in the prior determination that the miner did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

With respect to the survivor's claim, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits in both claims. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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 Co.*, 12 BLR 1-176, 1-177 (1989). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

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the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*,12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] The administrative law judge correctly noted that, although the two claims were consolidated for hearing, they are governed by different evidentiary rules. Specifically, because the survivor's claim was filed after January 19, 2001, it is subject to the evidentiary limitations of 20 C.F.R. §725.414, while the miner's claim, which was pending on that date, is not subject to the limitations. *See* 20 C.F.R. §725.2(c). The administrative law judge therefore correctly considered the issues of entitlement in accordance with the evidentiary rules applicable to each claim. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(*en banc*).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Section 725.310 provides that modification may be granted on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310 (2000). The administrative law judge on modification has the authority "to reconsider all the evidence for any mistake of fact or change in conditions." *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994). In this case, the administrative law judge incorporated by reference his previous summary of the evidence submitted in the miner's claim, Director's Exhibit 116, and summarized the additional evidence submitted with the current modification request.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seventeen readings of nine x-rays submitted on modification, and considered the readers' radiological qualifications. The administrative law judge accurately noted that the x-rays dated April 24, 1989, November 10, 1995, November 13, 1995, and December 4, 1995, were all read as negative for pneumoconiosis by Dr. Vuskovich, a B reader, and that the December 26, 1998 x-ray was read as negative by Dr. Sargent, a Board-certified radiologist and B reader.[5] Director's Exhibit 159.

The administrative law judge next considered that Drs. Ahmed and Miller, both Board-certified radiologists and B readers, and Dr. Sundaram, who at the time of his reading did not indicate that he possessed any special radiological qualifications, read a November 3, 2000 x-ray as positive for pneumoconiosis, and that Drs. Barrett, Sargent, and Wheeler, Board-certified radiologists and B readers, and Dr. Goldstein, a B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 143, 146, 150, 151, 153, 159. Based on the contrary readings by the more highly qualified readers, the administrative law judge reasonably found the November 3, 2000 x-ray to be inconclusive for the existence of pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Similarly, because Drs. Ahmed and Barrett were "equally qualified" and had rendered conflicting positive and negative readings of the November

[5] These were additional readings submitted by employer, on modification, of old x-rays that the administrative law judge had previously found to be negative for pneumoconiosis. Director's Exhibits 76, 116.

29, 2002 x-ray, the administrative law judge reasonably found that this x-ray was in equipoise for the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *White*, 23 BLR at 1-4-5.

Additionally, the administrative law judge correctly found that the November 28, 2001 and April 14, 2003 x-rays received only negative readings, by physicians qualified as Board-certified radiologists and B readers. Director's Exhibits 130, 159.

Based on the foregoing analysis of each x-ray, the administrative law judge determined that seven x-rays were negative for pneumoconiosis and two were inconclusive. The administrative law judge reasonably determined that the preponderance of the x-ray evidence did not support a finding of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White,* 23 BLR at 1-4-5. Substantial evidence supports the administrative law judge's finding that the existence of pneumoconiosis was not established by the new x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The finding is therefore affirmed.

Pursuant to 20 C.F.R. §718.202(a)(2),(3), the administrative law judge accurately determined that the record contains no biopsy evidence and no evidence of complicated pneumoconiosis, in this living miner's claim filed after January 1, 1982. Decision and Order at 15. We therefore affirm the administrative law judge's finding that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Sundaram, Sikder, Alam, Vuskovich, and Broudy. Director's Exhibits 143, 159; Employer's Exhibits 1, 2. Drs. Sundaram and Alam diagnosed the miner with pneumoconiosis, while Drs. Broudy and Vuskovich concluded that he did not have pneumoconiosis, but suffered from an obstructive impairment due to smoking. Dr. Sikder was consulted to clear the miner for a heart transplant, and she noted that the miner had chronic obstructive pulmonary disease (COPD) and mild restrictive lung disease. Director's Exhibit 159.

The administrative law judge permissibly found that Dr. Sundaram's opinion was not well-reasoned or documented and accorded his diagnosis of pneumoconiosis little weight, as Dr. Sundaram relied on an x-ray that was found to be inconclusive and was read as negative by more highly qualified physicians, and otherwise failed to explain his diagnosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Dr. Alam opined that the miner did not suffer from clinical pneumoconiosis, but that his pulmonary impairment was caused, in part, by coal dust exposure.[6] *See* 20 C.F.R. §718.201(a)(2); Director's Exhibit 159. The administrative law judge found the opinion unreasoned and permissibly accorded it little weight, as Dr. Alam did not adequately explain the basis for his conclusions. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark* 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR at 1-19 (1987).

Dr. Sikder noted the miner's coal dust exposure history of sixteen years, and a "significant" smoking history, and diagnosed the miner with COPD and mild restrictive lung disease. Director's Exhibit 159. As found by the administrative law judge, because Dr. Sikder did not link the impairments she diagnosed to coal mine dust exposure, her opinion cannot establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

The administrative law judge permissibly found that, by contrast, Drs. Broudy and Vuskovich rendered well-reasoned and documented opinions explaining how objective evidence indicated that the miner did not have either clinical or legal pneumoconiosis. *See Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); Employer's Exhibits 1, 2. As substantial evidence supports the administrative law judge's finding that claimant did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the finding is affirmed.

Based on the foregoing, we affirm the administrative law judge's finding that claimant did not establish a change in conditions with respect to the existence of pneumoconiosis. *See* 20 C.F.R. §725.310 (2000). Further, the administrative law judge found that the entire record did not establish a mistake of fact in the previous determination that the existence of pneumoconiosis was not established. *Id*. Substantial evidence supports this finding, which is therefore affirmed. As the administrative law judge properly found that the evidence failed to establish the existence of pneumoconiosis, an essential element of entitlement in a miner's claim under 20 C.F.R. Part 718, entitlement thereunder is precluded. *Anderson*, 12 BLR at 1-112. Therefore, we affirm the denial of benefits in the miner's claim.

The Survivor's Claim

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3,

[6] A finding of either clinical or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic disease or impairment of the lung and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the irrebuttable presumption provided at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-11 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of three x-rays. The administrative law judge correctly noted that the November 3, 2000 x-ray was read as positive by Dr. Ahmed, a Board-certified radiologist and B reader, while Dr. Wiot, a physician with identical qualifications, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 159. Similarly, the administrative law judge noted that the November 29, 2002 x-ray, was read as positive for pneumoconiosis by Dr. Ahmed, while Dr. Barrett, a physician with identical qualifications, read the same x-ray as negative for pneumoconiosis. *Id*. Given the physicians' "equal credentials," the administrative law judge reasonably found the November 3, 2000 and November 29, 2002 x-rays to be in equipoise for the existence of pneumoconiosis. *See White*, 23 BLR at 1-4-5. The administrative law judge also noted, correctly, that the November 28, 2001 x-ray was read as negative for pneumoconiosis by Dr. Wiot, a B reader and Board-certified radiologist, and there were no contrary interpretations. *Id.* Based on the foregoing analysis, the administrative law judge rationally concluded that since the only definitive reading was negative for pneumoconiosis, the x-ray evidence did not establish the existence of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White*, 23 BLR at 1-4-5. Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), (3), the administrative law judge accurately determined that the existence of pneumoconiosis was not established as the record contains no autopsy or biopsy evidence, no evidence of complicated pneumoconiosis, and the survivor's claim was filed after June 30, 1982. Decision and Order at 24. We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical opinions, treatment records, and the miner's death certificate. Dr. Skinner, the miner's treating physician, stated that the miner suffered from pneumoconiosis, while

Drs. Jarboe and Rosenberg opined that the miner did not have clinical or legal pneumoconiosis. Director's Exhibit 184; Employer's Exhibits 1, 2.

The administrative law judge permissibly found Dr. Skinner's opinion, that he "felt that [the miner] had some degree of coal miner's pneumoconiosis that resulted from his years of coal mine dust exposure," Director's Exhibit 184, to be conclusory, and not well-reasoned or documented, as Dr. Skinner failed to explain his reasoning or provide any objective evidence to support his conclusions. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Further, the administrative law judge rationally found that the miner's medical treatment records generally listed pneumoconiosis as a notation in the miner's medical history, but contained no explanation or documentation to support a diagnosis of pneumoconiosis. Director's Exhibit 183; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-149. In addition, the administrative law judge accurately found that the miner's death certificate completed by Dr. Skinner did not mention pneumoconiosis. Director's Exhibit 179.

Further, the administrative law judge permissibly found that Drs. Jarboe and Rosenberg rendered well-reasoned opinions that the miner did not have clinical or legal pneumoconiosis, but suffered from impairments due to smoking and heart disease. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Substantial evidence supports the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The finding is therefore affirmed.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trumbo*, 17 BLR at 1-87-88.

Accordingly, the administrative law judge's Decision and Order-Denial of 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