

BRB Nos. 09-0510 BLA
and 09-0511 BLA

ROSE NAPIER)
(Widow of and on behalf of CLAUDE)
NAPIER))
)
Claimant-Petitioner)
)
v.)
)
DOUBLE N CORPORATION) DATE ISSUED: 02/23/2010
)
and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits of Administrative Law
Judge William S. Colwell, rendered on a miner's claim (2006-BLA-06021) and a

survivor's claim (2006-BLA-06020) 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 credited the miner with fifteen years of coal mine employment, based on a stipulation by the parties and the evidence of record, and adjudicated both claims pursuant to 20 C.F.R. Part 718. With respect to the miner's claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence was insufficient to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b) or that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With respect to the survivor's claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, found that claimant was unable to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant further asserts that the administrative law judge erred in finding that the evidence was insufficient to establish the presence of a totally disabling respiratory or pulmonary impairment in the miner's claim pursuant to 20 C.F.R. §718.204(b)² and erred in finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits in both claims. The

¹ The miner filed a claim for benefits on September 9, 2002, which the district director denied. Director's Exhibits 2, 26. The miner requested a hearing and, while his claim was pending a hearing at the Office of Administrative Law Judges (OALJ), the miner died on May 20, 2004. Director's Exhibit 95. Subsequently, claimant, the widow of the miner, filed a survivor's claim for benefits on October 13, 2004. Director's Exhibit 35. The miner's claim was remanded to the district director and consolidated with the survivor's claim. Following findings of no entitlement by the district director on both claims, claimant requested a formal hearing and the claims were forwarded to the OALJ. Administrative Law Judge William S. Colwell conducted a formal hearing on March 12, 2008 and denied both claims in a Decision and Order issued on February 26, 2009. Claimant has appealed to the Board, contesting the denial of benefits in both the miner's claim and the survivor's claim.

² We note that although claimant cited to 20 C.F.R. §718.204(c), the regulatory provision pertaining to total respiratory or pulmonary disability is found at 20 C.F.R. §718.204(b).

Director, Office of Workers' Compensation Programs, has not participated in this appeal.³

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.⁴ 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that the miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that the miner was totally disabled, and that his total disability was due to pneumoconiosis. *See* 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. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In order to establish entitlement to survivor's benefits, pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that the miner suffered from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that 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 presumption relating to complicated pneumoconiosis, set forth 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 a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek*

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that the miner had fifteen years of coal mine employment and his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) in both the miner's claim and the survivor's claim. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), Decision and Order at 4, 7.

⁴ Because the miner's coal mine employment was in Kentucky, 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*); Director's Exhibit 3.

Mining Co., Inc., 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these requisite elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27.

Miner's Claim

Claimant asserts that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant states that the administrative law judge “relied almost solely on the qualifications of the physicians providing the x-ray interpretations,” and “placed substantial weight on the numerical superiority of x-ray interpretations,” and that he also “may have ‘selectively analyzed’ the x-ray evidence.” Claimant’s Brief at 3-4. Claimant’s arguments are without merit. The record in the miner’s claim consists of five readings of two x-rays dated May 16, 2003 and September 15, 2003. Dr. Harrison reviewed the May 16, 2003 x-ray and concluded that there was “[n]o radiological evidence of active or acute cardiac or pulmonary disease,” but did not render an ILO classification of his findings, while Dr. Barrett, a Board-certified radiologist and B reader, reviewed the x-ray for its film quality only. Decision and Order at 6; Director’s Exhibits 11, 12. The May 16, 2003 x-ray was read as positive for pneumoconiosis by Dr. Simpao, with no known radiological qualifications, and as negative for pneumoconiosis by Dr. Wheeler, a Board-certified radiologist and B reader. Director’s Exhibits 11, 14; Employer’s Exhibit 2. Dr. Dahhan, a B reader, interpreted the September 15, 2003 x-ray as negative for pneumoconiosis. Director’s Exhibit 13; Employer’s Exhibit 1.

Contrary to claimant’s contention, the administrative law judge permissibly accorded greatest weight to the negative readings by Dr. Wheeler, a dually qualified radiologist, and by Dr. Dahhan, a B reader, and based his finding, that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, on a rational, qualitative and quantitative analysis of the x-ray evidence. See *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order at 6. Therefore, we affirm the administrative law judge’s finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports of Drs. Simpao and Dahhan, the miner’s treatment records and his death certificate. Decision and Order at 8-9; Director’s Exhibits 11, 13, 44, 45, 47; Employer’s Exhibit 1. Dr. Simpao, who is Board-certified in Internal Medicine and Pulmonary Disease, examined the miner on May 16, 2003 and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director’s Exhibit 11. Dr. Simpao

diagnosed “CWP 1/0” and stated that “multiple years of coal dust exposure [were] medically significant in [the miner’s] pulmonary impairment.” *Id.* Dr. Dahhan, who is also Board-certified in Internal Medicine and Pulmonary Disease, examined the miner on September 15, 2003 and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director’s Exhibit 13; Employer’s Exhibit 1. Based upon this data, Dr. Dahhan concluded that there was insufficient objective evidence to make a diagnosis of coal workers’ pneumoconiosis or a dust induced lung disease. *Id.* Treatment records from 1996 to 2004 at the Christian Health Center contain records of the miner’s treatment for several medical conditions unrelated to coal mine employment. Director’s Exhibit 47. The death certificate, dated May 20, 2004, is signed by Gregory Walker, the Leslie County Coroner, and lists, among the causes of death, metastatic renal cancer with progression to the lungs, but does not mention pneumoconiosis. Director’s Exhibit 44.

The administrative law judge found that the evidence was insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 10. Specifically, the administrative law judge found that Dr. Simpao relied on his own positive x-ray reading, while “the preponderance of the x-ray readings by the more highly qualified physicians [is] negative for the disease.” *Id.* In addition, the administrative law judge accorded Dr. Simpao’s diagnosis of pneumoconiosis less weight because Dr. Simpao failed to explain how his conclusions were supported by the underlying documentation, other than the miner’s history of exposure and a mild impairment during pulmonary function testing, and Dr. Simpao failed to discuss the impact of the miner’s smoking history. *Id.* Rather, the administrative law judge found Dr. Dahhan’s opinion, that the miner was not suffering from pneumoconiosis or a dust induced lung disease, to be “better-reasoned and better-supported by the objective laboratory data of record,” including the treatment records which did not mention pneumoconiosis. *Id.* Consequently, the administrative law judge accorded greater weight to Dr. Dahhan’s opinion than Dr. Simpao’s opinion and found that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Claimant contends that the administrative law judge erred in rejecting Dr. Simpao’s opinion as based on a positive x-ray reading that was “contrary to the [administrative law judge’s] findings.” Claimant’s Brief at 5. In addition, claimant argues that Dr. Simpao’s opinion was well-reasoned and should not have been rejected for the reasons the administrative law judge provided. *Id.* Claimant’s contentions are without merit. Claimant essentially requests a reweighing of the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR at 1-113. Contrary to claimant’s contention, the administrative law judge permissibly found that Dr. Simpao’s diagnosis of pneumoconiosis did not constitute a documented and reasoned medical opinion because Dr. Simpao “fail[ed] to explain how the [m]iner’s physical findings, symptomatology or pulmonary function study results are due to coal mine dust exposure

as opposed to any other etiology, including the [m]iner's significant smoking history.” Decision and Order at 10; 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, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 10. Consequently, we affirm the administrative law judge's finding that Dr. Simpao's opinion was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because claimant does not otherwise challenge the administrative law judge's specific findings pursuant to 20 C.F.R. §718.202(a)(4), we affirm his finding that claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).⁵ *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-155; Decision and Order at 10.

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in the miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits in the miner's claim, and it is not necessary to address claimant's contentions with respect to total disability. See *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Survivor's Claim

With regard to the survivor's claim, the administrative law judge concurrently applied the credibility findings he made in the miner's claim with respect to the x-ray and medical opinion evidence that was also in the record in the survivor's claim. Decision and Order at 14. For the reasons set forth in our consideration of claimant's appeal of the denial of benefits in the miner's claim, we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) in the survivor's claim, as it is supported by substantial evidence.

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we also affirm the administrative law judge's denial of benefits in the survivor's claim. See *Trumbo*, 17 BLR at 1-87; *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge in the miner's claim and the survivor's claim is affirmed.

⁵ We reject claimant's assertion that the administrative law judge “appears to have” substituted his opinion for that of a medical expert, in the absence of any supporting evidence for this assertion. Claimant's Brief at 5.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge