BRB Nos. 06-0579 BLA
and 06-0579 BLA-A

BRENDA OUSLEY (Widow of HAROLD OUSLEY) Claimant-Petitioner v. ISLAND CREEK COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/25/2007 DECISION and ORDER

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

Brenda Ousley, Drift, Kentucky, *pro se*.

Kathy Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle Gerdano (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, and employer cross-appeals the Decision and Order – Denying Benefits (05-BLA-5107) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge credited the miner with ten years of coal mine employment and adjudicated both claims pursuant to the regulations contained at 20 C.F.R. Part 718. The administrative law judge found employer to be the responsible operator.[2] The administrative law judge found the evidence insufficient to establish the existence of the pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits in the miner's claim and the survivor's claim.

On appeal, claimant challenges the administrative law judge's findings that the miner did not have pneumoconiosis, that the miner was not totally disabled, and that the miner's death was not due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits, and has filed a cross-appeal, requesting the Board to reverse the administrative law judge's exclusion of employer's medical evidence which exceeded the evidentiary limitations at 20 C.F.R §725.414. The Director, Office of Workers' Compensation Programs, responds to employer's cross-appeal, and urges the Board to reject it.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 with law. 33 U.S.C. §921(b)(3), as

[1] Claimant is the widow of the miner. The miner filed a claim for benefits on February 1, 2002, but died on July 23, 2003. Director's Exhibits 1, 13. The claim was denied by the district director on September 30, 2003 because the miner failed to establish the existence of pneumoconiosis and a totally disabling respiratory impairment. Director's Exhibit 30. Claimant requested a hearing on behalf of the miner, and filed a claim for survivor's benefits. Director's Exhibits 31, 38. The district director denied the survivor's claim on April 13, 2004. Director's Exhibit 60. Claimant and employer requested a formal hearing. Director's Exhibits 61, 62.

[2] Since the administrative law judge's findings regarding length of employment, dependency, whether the claimant is an eligible survivor, and whether the employer is the responsible operator, are not challenged on appeal, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 be entitled to benefits on the miner's claim under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven readings of two x-rays in light of the readers' radiological qualifications.[3] Five of the readings were negative and two were positive. Dr. Forehand, a B reader, and Dr. Potter, who lacks radiological qualifications, read the May 15, 1998 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1; Director's Exhibit 48. Dr. Wiot, who is a Board-certified radiologist and a B reader, read the May 15, 1998 x-ray as negative for pneumoconiosis. Employer's Exhibit 15. The administrative law judge found that the May 15, 1998 x-ray was negative for pneumoconiosis because a more highly qualified physician found no abnormalities consistent with pneumoconiosis. Decision and Order at 13. The administrative law judge also found the April 10, 2002 x-ray negative for pneumoconiosis as all the physicians read the x-ray as negative. Decision and Order at 13. Accordingly, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge based his finding on a proper quantitative and qualitative 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*,

[3] Director's Exhibit 16, an interpretation of the April 10, 2002 x-ray by Dr. Sargent, a Board certified radiologist and B reader, was for film quality only.

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). 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), the administrative law judge considered the biopsy report from Dr. Caffrey, who opined that the miner did not suffer from pneumoconiosis, but had emphysema and lung cancer. Employer's Exhibit 1. The administrative law judge's determination that claimant did not prove the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2) is supported by substantial evidence and therefore affirmed. Decision and Order at 14.

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge accurately determined that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in these claims filed after January 1, 1982 in which the record contains no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical opinions: from Dr. Wicker, Dr. Ghio and Dr. Repsher. Director's Exhibit 15; Employer's Exhibits 2, 3. Dr. Wicker examined the miner for the Department of Labor, while Drs. Ghio and Repsher provided consultative opinions based on the medical evidence of record. Decision and Order at 15. The administrative law judge properly determined that since none of these well reasoned and documented reports diagnosed that the miner suffered from pneumoconiosis, claimant did not prove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 14-15. Consequently, we affirm 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).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits in the miner's claim. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Consequently, we need not address claimant's arguments concerning the administrative law judge's finding that the evidence did not establish that the miner was totally disabled.

Regarding the survivor's claim, the administrative law judge considered the same medical evidence submitted in the miner's claim, namely, the x-ray interpretations of Drs. Potter, Forehand, Wiot, Ghio, and Repsher, and the biopsy report of Dr. Caffrey. Director's Exhibits 47, 48; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4, 12. As discussed above, the administrative law judge found that the x-ray evidence and the

biopsy evidence did not establish the existence of pneumoconiosis. Decision and Order at 18.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge also reviewed the medical opinions of Drs. Michos and Branscomb. Employer's Exhibits 8-10. Dr. Michos provided a report, while Dr. Branscomb provided his opinion via deposition following review of the medical evidence of record. The administrative law judge permissibly found that the opinions of Drs. Michos and Branscomb stating that the miner did not suffer from pneumoconiosis were well reasoned and well-documented. *See Fields*, 10 BLR at 1-22. Consequently, we affirm 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).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim under Part 718, we affirm the administrative law judge's denial of benefits in the survivor's claim. *Trumbo*, 17 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Employer argues that the administrative law judge erred in excluding Employer's Exhibit 11, the medical report of Dr. Thomas Jarboe, for exceeding the limitations of evidence set forth at Section 725.414. Employer's Brief at 16. Employer generally argues that the evidentiary limitations are invalid. The Board has already rejected this argument in *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-154 (2006), and we decline to consider it further. *See also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge