BRB Nos. 07-0391 BLA and
07-0391 BLA-A

A.R. (Widow of B.R.) Claimant-Petitioner Cross-Respondent v. SHAMROCK COAL COMPANY, INCORPORATED 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: 01/30/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Survivor's Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (04-BLA-6330) of Administrative Law Judge Daniel A. Sarno, Jr., 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 miner died on December 8, 2002, and claimant filed her application for survivor's benefits on February 3, 2003. Director's Exhibits 3, 9. In a decision dated December 19, 2006, the administrative law judge credited the miner with eighteen years of coal mine employment[1] and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and did not establish 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.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and erred in finding that the medical evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. Employer also cross-appeals, challenging the administrative law judge's exclusion, pursuant to 20 C.F.R. §725.414, of an autopsy report and two medical opinions that employer proffered at the hearing. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response agreeing with employer that its autopsy report was improperly excluded.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[1] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 1. 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, 1-202 (1989)(*en banc*).

[2] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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 Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (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).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. Claimant's assertion lacks merit. The administrative law judge properly found that, as the x-ray evidence consists of one negative reading of a December 24, 2001 x-ray by Dr. Wheeler, a B reader and Board-certified radiologist, claimant failed to meet her burden of proof to establish the existence of pneumoconiosis by x-ray evidence. *See* 20 C.F.R. §718.102(b); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 13; Director's Exhibit 14. In addition, we reject claimant's assertion that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant next challenges the administrative law judge's finding that pneumoconiosis was not established by medical opinion evidence at 20 C.F.R. §718.202(a)(4), asserting that the administrative law judge improperly accorded diminished weight to the opinion of Dr. Anand, who was the miner's treating physician. Claimant's Brief at 4-6. Claimant's argument is without merit.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the relevant evidence of record, consisting of the death certificate, an autopsy report,

numerous treatment notes and hospital records, and medical reports from Drs. Rosenberg, Vuskovich, and Anand. The administrative law judge properly found that Dr. Rosenberg and Dr. Vuskovich, who both conducted a review of the medical records, opined that the miner did not have coal workers' pneumoconiosis or any chronic dust disease or impairment arising out of coal mine employment. Decision and Order at 4-5; Director's Exhibit 1; Employer's Exhibit 1. By contrast, Dr. Anand, the miner's treating physician, opined that the miner suffered from "black lung." Claimant's Exhibit 1.

Contrary to claimant's arguments, the administrative law judge properly considered Dr. Anand's status as the miner's treating physician, but permissibly accorded his opinion very little weight because the physician provided no documentation or explanation for his conclusory opinion that the miner had "black lung" disease. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); Decision and Order at 14-15. The administrative law judge further acted within his discretion in according greater weight to the opinions of Drs. Vuskovich and Rosenberg because they offered more complete explanations for their conclusions that the miner did not have clinical or legal pneumoconiosis, and because their conclusions were better supported by the objective evidence of record, including the x-ray and autopsy evidence, which was negative for the existence of pneumoconiosis. *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 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 15-16; Employer's Exhibits 1, 2, 4, 5, 8.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, we affirm the administrative law judge's finding that the miner did not have pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish that the miner had pneumoconiosis, a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

We next address the arguments raised by employer on cross-appeal. Employer initially asserts that in evaluating the survivor's claim, the administrative law judge abused his discretion in declining to consider evidence submitted in the miner's

unsuccessful claim, based upon the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer does not dispute that that regulation is applicable to the survivor's claim. *See* 20 C.F.R. §725.2(c). Employer specifically contends that the administrative law judge misapplied the regulation to exclude evidence in the miner's claim after it had been admitted into the record without objection. Employer's Brief at 5. Contrary to employer's argument, the evidentiary limitations are mandatory and may not be waived. *Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-74 (2004); Director's Brief at 2-3. Moreover, as the Director asserts, the Board has held that evidence from the miner's previous claim is not automatically available in a subsequent survivor's claim filed pursuant to the revised regulations. Instead, the medical evidence from the prior living miner's claim must be designated as evidence by one of the parties, in accordance with the limitations of 20 C.F.R. §725.414, in order for the evidence to be included in the record in the survivor's claim. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(*en banc*). In this case, neither party designated any specific evidence from the miner's claim, contained in Director's Exhibit 1, to be included in consideration of the survivor's claim.

In addition, although employer argues that all relevant evidence must be considered, the United States Court of Appeals for the District of Columbia Circuit, and the Board, have rejected the arguments that the evidentiary limitations violate the provision of Section 413(b) of the Act, that all relevant evidence be considered, or violate the Administrative Procedure Act, which specifically allows for the exclusion of irrelevant or unduly repetitious evidence. *Nat'l Mining Ass'n v. Dep't. of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Dempsey*, 23 BLR at 1-58. Moreover, employer has not asserted a basis for its claim that "good cause" justified admitting the evidence from the miner's claim. 20 C.F.R. §725.456(b)(1). Accordingly, we hold that the administrative law judge properly declined to consider the evidence submitted with the living miner's claim when considering the survivor's claim. *Keener*, 23 BLR at 1-241.

Employer next contends that the administrative law judge erred in excluding employer's affirmative-case autopsy report[3] from Dr. Caffrey, contained at Employer's Exhibit 7, on the ground that it did not substantially comply with the quality standards set forth in 20 C.F.R. §718.106, which require that an autopsy report include both a detailed, gross macroscopic and microscopic description of the lungs or visualized portion of the lung. *See* 20 C.F.R. §718.106; Employer's Brief at 7; Decision and Order at 2. Employer further asserts that, by extension, the administrative law judge also erred in

[3] The applicable provision of 20 C.F.R. §725.414 entitled employer to "submit, in support of its affirmative case . . . no more than one report of an autopsy . . . ." 20 C.F.R. §725.414(a)(3)(i).

excluding the medical reports of Drs. Rosenberg and Vuskovich contained in Employer's Exhibits 3 and 6, on the ground that the physicians wholly relied on the material in the excluded autopsy report from Dr. Caffrey. Employer's Brief at 11. We agree.

The Board held in *Keener* that "in light of the comments to the regulations and the practical concerns surrounding the requirement for a detailed macroscopic description of the lungs," a physician's review of a miner's autopsy slides could constitute an affirmative report of an autopsy pursuant to 20 C.F.R. §725.414(a)(3)(i). *Keener*, 23 BLR at 1-237-38. In this case, the administrative law judge erred in finding that Dr. Caffrey's report, in which Dr. Caffrey reviewed the miner's autopsy slides, could not constitute an "autopsy report" for purposes of the evidentiary limitations at 20 C.F.R. §725.414, and erred in excluding Dr. Caffrey's report from the record. *Id.* Consequently, while, as the Director asserts, it is within an administrative law judge's discretion to exclude a report that is based on inadmissible evidence, *see Keener*, 23 BLR at 1-241-242; *Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting), in light of our holding that the administrative law judge erred in excluding the entirety of Dr. Caffrey's autopsy report, we hold that the administrative law judge also erred in excluding Employer's Exhibits 3 and 6 because these reports relied on Dr. Caffrey's report. However, because we have affirmed the administrative law judge's denial of benefits, the administrative law judge's exclusion of Employer's Exhibits 3, 6, and 7 is harmless error. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Survivor's Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge