

BRB No. 08-0328 BLA

D.M.)
(Widow of W.M.))
)
Claimant-Petitioner)
)
v.)
)
ISLAND CREEK KENTUCKY MINING)
)
and)
)
ISLAND CREEK COAL COMPANY C/O) DATE ISSUED: 01/27/2009
ACORDIA EMPLOYERS SERVICE)
)
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 Survivor's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

D.M., Honaker, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Survivor's Benefits (2007-BLA-05364) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) on a 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 administrative law judge found that the miner had twenty-four years of qualifying coal mine employment and adjudicated this survivor's claim pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that the evidence did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement. Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employer has responded, urging the Board to affirm the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *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.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 survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). In claims filed on or after January 1, 1982, death is considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption at 20 C.F.R. §718.304 is available, based on a finding of complicated pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R.

¹ Claimant is the surviving spouse of the miner, who died on February 27, 2006. Director's Exhibit 9. The miner had filed a claim for benefits on July 23, 1990, which was finally denied in a Decision and Order issued by Administrative Law Judge Pamela Lakes Wood on May 18, 2000. Claimant filed this survivor's claim on March 24, 2006. Director's Exhibit 2.

² The law of the United States Court of Appeals for the Fourth Circuit is applicable in this case, as claimant was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3-5.

§718.205(c)(5); see *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (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 Section 718.202(a)(1), the administrative law judge considered the x-ray evidence, which consists of four readings of four x-rays. Dr. Robinette, whose qualifications are not of record, interpreted the film dated May 18, 1989, as positive for pneumoconiosis. Director's Exhibit 15 at 14. Dr. Westerfield, a Board-certified radiologist and B reader, interpreted the x-ray obtained on May 8, 1991, as positive for pneumoconiosis. Director's Exhibit 15 at 24. Dr. Wiot, also a Board-certified radiologist and B reader, read the film dated September 8, 2003, as negative for pneumoconiosis. Employer's Exhibit 1. Dr. Castle, a B reader, interpreted the x-ray dated April 21, 2004, as negative for pneumoconiosis. Employer's Exhibit 2.

The administrative law judge rationally determined that the weight of the x-ray evidence did not establish pneumoconiosis, as the preponderance of readings by physicians who are B readers, or both B readers and Board-certified radiologists, was negative for the disease. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09, 22 BLR 2-162, 2-169-70 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order at 6. We affirm, therefore, the administrative law judge's finding that the existence of pneumoconiosis was not established under Section 718.202(a)(1).

Additionally, we affirm the administrative law judge's findings that pneumoconiosis could not be established at Section 718.202(a)(2) and (3), as the record contains no autopsy or biopsy evidence and the presumptions set forth in 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable in this case, as the miner died after March 1, 1978 and there is no evidence indicating that he suffered from complicated pneumoconiosis. Decision and Order at 5 n. 5.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Smiddy, Henry, Castle and Rosenberg. In a report dated May 8, 1991, Dr. Smiddy indicated that the miner had pneumoconiosis that was significant enough to prevent him from being able to perform his coal mining duties. Director's Exhibit 15. Dr. Henry proffered a letter dated August 31, 2006, in which he stated that the miner's "underlying lung disease was mainly due to exposure to coal dust." Director's Exhibit 15. Dr. Castle reviewed the medical evidence of record and in a report dated March 26, 2007, he concluded that the miner did not have pneumoconiosis. Employer's Exhibit 4. Dr. Rosenberg reviewed the medical evidence of record and

opined in a report dated March 28, 2007, that the miner did not have clinical or legal pneumoconiosis. Employer's Exhibit 5.

The administrative law judge credited the opinions of Drs. Castle and Rosenberg as well reasoned and well documented, because they reviewed a "wide breadth of current and older medical opinions and benefited from viewing [c]laimant's condition over the course of many years."³ Decision and Order at 8. The administrative law judge further found that both Drs. Rosenberg and Castle relied on "essentially accurate occupational and smoking histories, given the divergent estimates the miner provided of his prior smoking history." *Id.* Additionally, the administrative law judge determined that both Drs. Rosenberg and Castle are "well credentialed" physicians, as they are Board-certified pulmonologists and B readers. *Id.* at 8-9.

With respect to Dr. Smiddy's opinion, the administrative law judge concluded that "given the subsequent fifteen year undocumented time period prior to the miner's death," he could not accord the physician's diagnosis of pneumoconiosis "more than minimal weight." Decision and Order at 9. The administrative law judge assigned no weight to Dr. Henry's opinion because he inaccurately stated that the miner had "died a number of years ago," when he had died approximately six months prior to the opinion being rendered. *Id.* Additionally, the administrative law judge found that Dr. Henry was unaware that the miner had a smoking history and did not indicate whether he was aware of any of the negative objective testing in the record. *Id.* The administrative law judge also indicated that Dr. Henry based his diagnosis of pneumoconiosis, in part, upon an x-ray interpretation that was not classified in accordance with the ILO system as required under 20 C.F.R. §718.102(b). *Id.*

In light of these findings, the administrative law judge determined that the opinions of Drs. Rosenberg and Castle outweighed the opinions of Drs. Smiddy and Henry. Decision and Order at 9. The administrative law judge concluded, therefore, that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4). *Id.* We affirm this finding, as the administrative law judge acted rationally in giving greatest weight to the opinions of Drs. Rosenberg and Castle in light of their qualifications as Board-certified pulmonologists, and because their conclusions were based upon a more accurate and comprehensive view of the relevant evidence, including

³ The medical evidence reviewed by Drs. Castle and Rosenberg was entered into the record as treatment and hospitalization records pursuant to 20 C.F.R. §725.414(a)(4). Hearing Transcript at 11; Director's Exhibits 9-15.

the miner's work and smoking histories.⁴ *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-335. In addition, we affirm the administrative law judge's determination that, when weighed together, the evidence relevant to Section 718.202(a) is insufficient to establish the existence of pneumoconiosis, as it is rational and supported by substantial evidence. *Compton*, 211 F.3d at 211, 22 BLR at 2-169-70; Decision and Order at 10. Because we have affirmed the administrative law judge's finding that claimant did not prove that the miner had pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

⁴ Dr. Smiddy's qualifications are not of record. Dr. Henry's curriculum vitae does not indicate that he is Board-certified in any medical subspecialty. Director's Exhibit 15 at 4-6.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge