

BRB No. 13-0357 BLA

JUDY BOWLING)
(Widow of CHARLES BOWLING))
)
 Claimant-Petitioner)
)
 v.)
)
 MOUNTAIN CLAY, INCORPORATED)
)
 and) DATE ISSUED: 01/15/2014
)
 TRANSCO ENERGY COMPANY,)
 c/o JAMES RIVER COAL 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 Peter B. Silvain, Jr.,
Administrative Law Judge, United States Department of Labor.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2010-BLA-5398) of
Administrative Law Judge Peter B. Silvain, Jr., rendered on a survivor's claim filed
pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

¹ Claimant is the widow of the miner, who died on April 6, 2000. Decision and
Order at 2; Director's Exhibits 2, 10.

944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on April 23, 2009.

Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

The administrative law judge found that the parties stipulated to fifteen years of coal mine employment; however, there was no need to determine if the dust conditions of the miner's surface mine employment were substantially similar to those in an underground mine, because the evidence did not establish that the miner had a totally disabling respiratory impairment. Further, because the evidence did not establish that the miner had a totally disabling respiratory impairment, the administrative law judge determined that claimant failed to invoke the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.² The administrative law judge further determined that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, concluded that claimant was not entitled to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4).³ Claimant also contends that the administrative law judge erred in finding that pneumoconiosis was not an underlying cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Neither employer, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

² Because claimant does not challenge the administrative law judge's finding that the medical evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we also affirm his finding that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *Skrack*, 6 BLR at 1-711.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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 survivor's 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant argues 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). Specifically, claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis by relying almost solely on the interpretations of the readers with superior qualifications, and by relying on the "numerical superiority" of certain x-ray interpretations. Claimant also contends that the administrative law judge "may have selectively analyzed" the x-ray evidence, which he may not do. These contentions are without merit.

The administrative law judge noted that the record does not contain any chest x-ray readings submitted as affirmative evidence and found that, while the treatment records include x-ray interpretations, none of the interpretations contained in those records supports a finding of coal workers' pneumoconiosis. Decision and Order at 11. Specifically, the administrative law judge found that:

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 2. 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).

[N]one of the x-rays in the treatment records are [sic] classified according to the ILO classifications, nor do any of the physicians who interpreted them specifically state whether they reveal clinical pneumoconiosis.

Id. Weighing these x-ray interpretations, the administrative law judge determined that the x-ray evidence did not establish the existence of pneumoconiosis, as the x-rays in the treatment records did not indicate the presence or absence of pneumoconiosis. *Id.* Contrary to claimant's assertion, therefore, the record reflects that the administrative law judge based his finding upon 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*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant's arguments that the administrative law judge improperly relied solely on the readers' credentials, that he merely counted the negative readings, and that he "may have selectively analyzed" the x-ray readings, lack merit. Therefore, we affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as it is rational and supported by substantial evidence.

In challenging the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in finding that the medical opinions of record failed to establish the existence of pneumoconiosis. Specifically, claimant asserts that the administrative law judge may not discredit an opinion of a physician whose report is based on a positive x-ray interpretation, contrary to his findings, and that it is error for the administrative law judge to substitute his own conclusions for those of a physician. Claimant's Brief at 4. However, the record contains no evidence to support claimant's burden of proof at 20 C.F.R. §718.202(a)(4). The administrative law judge correctly found that there were two medical opinions of record, by Drs. Caffrey and Vuskovich, and that their opinions are well-reasoned and well-documented and entitled to full probative weight. Decision and Order at 11; Director's Exhibits 17, 18; Employer's Exhibit 1. The administrative law judge further correctly found, however, that neither physician opined that the miner had clinical or legal pneumoconiosis. *Id.* Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant's failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1)-(4), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 197 (6th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.* 12 BLR 1-111, 1-113 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). We, therefore, affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge