

BRB No. 05-0136 BLA

SEVERIO M. OBERTO )  
(Widow of LEON OBERTO) )  
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 Claimant-Petitioner )  
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 v. )  
 )  
 PEABODY COAL COMPANY )  
 )  
 and )  
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 OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 07/26/2005  
 )  
 Employer/Carrier- )  
 Respondent )  
 )  
 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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Susan R. Barrow (Oswald, Cottey, Templeton, Barrow, Swedberg, Briggs & Bonnett, P.C.), Macon, Missouri, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, the miner's widow,<sup>1</sup> appeals the Decision and Order (2003-BLA-0104 and 2003-BLA-0243) of Administrative Law Judge Pamela Lakes Wood denying benefits on a miner's duplicate claim and a request for modification in 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, Leon Oberto, filed his original claim for black lung benefits on November 20, 1985, which was denied by the district director on March 4, 1986. Decision and Order at 2; Director's Exhibit 49. The miner filed his second claim on August 11, 1997, and was found to be entitled to benefits. Employer controverted the finding and requested a hearing. On March 11, 2000, while the miner's claim was pending with the Office of Administrative Law Judges, the miner died. Decision and Order at 2; Director's Exhibit 52. On May 12, 2000, the miner's widow, claimant herein, filed a survivor's claim, which was denied by the district director on August 30, 2000. Decision and Order at 2; Director's Exhibit 61. On August 1, 2001, claimant requested modification, which was denied. Claimant thereafter requested a hearing. Subsequently, the miner's claim and the survivor's claim were consolidated and the case was referred to the Office of Administrative Law Judges. The administrative law judge accepted the stipulation by the parties and credited the miner with thirty-four and three-quarter years of coal mine employment. The administrative law judge adjudicated the miner's duplicate claim and the survivor's modification request pursuant to the regulations contained in 20 C.F.R. Part 718.

With regard to the miner's claim, the administrative law judge acknowledged the standard set forth in *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997), and found that the evidence developed since the denial of the miner's prior claim established that the miner suffered from a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2). The administrative law judge thus concluded that claimant demonstrated a material change in conditions in the miner's claim. *See* 20 C.F.R. §725.309(d) (2000). Upon a *de novo* review of the entire evidentiary record, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits on the miner's claim.

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<sup>1</sup> Claimant is Severio M. Oberto, the widow and surviving spouse of the deceased miner, Leon Oberto, who died on March 11, 2000. Decision and Order at 2; Director's Exhibit 52.

With respect to the survivor's claim, the administrative law judge considered all of the evidence of record and found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on the survivor's claim.

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) in the miner's claim. Claimant also contends that the administrative law judge erred in finding that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivor's claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal. Claimant has filed a reply brief wherein she reiterates the contentions raised in her brief.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if 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)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Claimant contends that the administrative law judge erred in her consideration of the x-ray evidence. We disagree. The administrative law judge discussed the thirty readings of the six x-rays taken between January 21, 1986 and May 10, 1999, as well as the qualifications of the readers. Decision and Order at 8-12; Director's Exhibits 10, 26-27, 29-30, 38-42, 49; Claimant's Exhibits 3-8, 10, 15; Employer's Exhibit 13. In her discussion of the conflicting interpretations of each individual x-ray, the administrative law judge addressed the conflicts and found that in nearly every case, since the most qualified readers disagreed, the x-rays neither supported nor negated a finding of the existence of pneumoconiosis.<sup>2</sup> Decision and Order at 11-12. In analyzing all of the x-ray evidence together, the administrative law judge noted that there were fourteen positive interpretations, eleven negative, and five interpretations of "0/1."<sup>3</sup> Decision and Order at 12. The administrative law judge also observed that all eleven negative interpretations were by dually qualified readers while there were eight positive interpretations by dually qualified readers. *Id.* Based on her analysis of the x-ray evidence alone, the administrative law judge concluded that she had "no basis for selecting the positive interpretations over the negative ones or vice versa, as equally qualified readers disagree." *Id.* The administrative law judge thus rationally concluded that the x-ray evidence was in equipoise and thus that claimant failed to carry her burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 12. As the administrative law judge properly considered both the quality and quantity of the x-ray evidence, we reject claimant's contention that the administrative law judge failed to adequately explain the basis of her determination. *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). We therefore affirm the administrative law judge's finding that the x-ray evidence was in equipoise and thus insufficient to establish the

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<sup>2</sup> The administrative law judge found that the November 17, 1998, x-ray, taken alone, tended to negate a finding of the existence of pneumoconiosis. Decision and Order at 12.

<sup>3</sup> An x-ray interpretation of 0/1 is not a positive reading for the existence of pneumoconiosis. See 20 C.F.R. §718.102(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984).

existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(1), as it is supported by substantial evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In challenging the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in discounting Dr. Cohen's opinion that claimant has pneumoconiosis and in crediting the contrary opinion of Dr. Tuteur. In addition, claimant contends that the opinions of Drs. DeLine, Politte, and Suich, which include a diagnosis of pneumoconiosis, should have been credited.

Dr. Cohen reviewed the medical records in this case, and diagnosed both clinical and legal pneumoconiosis, stating that the miner's chronic respiratory condition was substantially related to his forty years of coal mine employment, as well as his fifty pack-year history of tobacco smoke exposure. Decision and Order at 14-15; Claimant's Exhibits 1, 14. In contrast, Dr. Tuteur, in a consultative opinion and in testimony at the hearing, concluded that the miner did not have pneumoconiosis, clinical or legal, in light of x-ray evidence in the record showing no changes consistent with pneumoconiosis and physiologic findings and physical examination findings consistent with mild chronic obstructive lung disease attributable to smoking and heart disease, rather than coal workers' pneumoconiosis. Decision and Order at 15; Employer's Exhibit 1, 11; Hearing Transcript at 40-83. Drs. Renn and Repsher also concluded that the miner did not have pneumoconiosis. Decision and Order at 14-15; Employer's Exhibits 3, 12, 14, 16-17.

The administrative law judge permissibly found that the opinions in which Drs. Tuteur, Renn, and Repsher discounted the contribution of coal mine employment to the miner's respiratory condition were better reasoned and documented and thus more persuasive than Dr. Cohen's opinion. Decision and Order at 16-18; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

Claimant contends that the administrative law judge failed to address Dr. Cohen's response to Dr. Tuteur's comments regarding the cause of the miner's diminished diffusion capacity. Claimant's Brief at 14. Claimant also contends that the administrative law judge erred in finding that Dr. Cohen provided a deficient explanation that the miner's lung condition was due to dust exposure and in concluding that Dr. Cohen's opinion was based on general studies. Claimant's Brief at 15-18. In discussing

the medical opinions of Dr. Cohen and the contrary opinions of Drs. Repsher, Renn, and Tuteur, the administrative law judge discussed their qualifications and noted Dr. Cohen's disagreement with the diagnosis of idiopathic pulmonary fibrosis and the conclusions by Drs. Repsher, Renn, and Tuteur. Decision and Order at 14-15. Dr. Cohen agreed with Dr. Repsher that the miner had emphysema and obstructive lung disease, but disagreed that it was caused solely by cigarette smoking, or that the miner's problems were entirely explained by his heart disease. *Id.* In response to Dr. Tuteur's testimony, Dr. Cohen noted that there was no waxing and waning in the diffusion capacity reduction and opined it was unlikely that the miner's congestive heart failure would have caused the diffusion impairment. *Id.* In addressing Dr. Tuteur's opinion, the administrative law judge noted that he testified at the hearing and opined that the miner did not suffer from either clinical or legal pneumoconiosis and that his symptoms were due to heart disease, specifically, severe progressive ischemic cardiomyopathy complicated by dysrhythmias, heart failure, and cardiac arrest. Decision and Order at 15, Employer's Exhibit 1, Hearing Transcript at 40-84. The administrative law judge noted that Dr. Tuteur disputed Dr. Cohen's interpretation of the epidemiological data and determined that they were not relevant in this case. *Id.* The administrative law judge summarized Dr. Tuteur's testimony regarding the x-ray findings. *Id.* In addition, the administrative law judge concluded that Dr. Cohen's findings were based upon general epidemiological evidence rather than specific findings relating to the miner, thus undermining the credibility of his explanation of the causal connection between the miner's lung condition and coal mine dust exposure. Decision and Order at 16. Moreover, the administrative law judge explained that while Dr. Cohen's discussion of the epidemiological evidence was convincing, he did not adequately address the significance of the twenty year lapse of time between the miner's departure from mining and his development of the condition, since the doctor mentioned only studies showing progression up to ten years after the subject miners left the mines, thus failing to provide a rationale in this case for its sudden progression approximately two decades later. *Id.*

Contrary to claimant's assertions, the administrative law judge adequately addressed Dr. Cohen's findings with respect to the diffusion capacity, delayed onset of symptoms, and his response to Dr. Tuteur's remarks. The administrative law judge permissibly discounted Dr. Cohen's opinion that the miner had legal pneumoconiosis on the ground that Dr. Cohen relied on medical publications to support his conclusion that coal dust can cause obstructive lung disease, without adequately explaining why the miner's specific lung condition is caused by his coal dust exposure. *Clark*, 12 BLR at 1-155; Decision and Order at 16-18; Claimant's Exhibits 1, 14. As such, the administrative law judge permissibly found that claimant failed to satisfy her burden of establishing the existence of pneumoconiosis under any of the individual subsections of Section 718.202(a) or under Section 718.202(a) as a whole. Moreover, claimant's mere reference to the opinions of Drs. DeLine, Politte, and Suich, without a specific allegation of error on the administrative law judge's part in her consideration of them, provides no basis for

review of the administrative law judge's reasons for discounting the opinions of these physicians. *Sarf v. Director*, OWCP, 10 BLR 1-119 (1987).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, precludes an award of benefits on both the miner's and the survivor's claims under 20 C.F.R. Part 718. *Trent*, 11 BLR at 1-27. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

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

SO ORDERED.

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NANCY S. DOLDER  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. MCGRANERY  
Administrative Appeals Judge