BRB No. 99-0993 BLA

HELEN MITCHELL (Widow of GEORGE MITCHELL)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
HOBET MINING COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Helen Mitchell, Chapmanville, West Virginia, *pro se.*

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without the assistance of counsel, appeals the Decision and Order (96-BLA-1898) of Administrative Law Judge Gerald M. Tierney denying benefits on a living 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).[1] The administrative

[1]Claimant is Helen Mitchell, widow of the miner, George Mitchell, who initially filed a claim for benefits on February 20, 1970. Director's Exhibit 74. This claim was finally denied on July 1, 1983, and the miner filed a duplicate claim on February 19, 1993. Director's Exhibits 1, 74. The miner died on August 12, 1994, and claimant filed for survivor's benefits on September 19, 1994. Director's Exhibits 52, 57. The claims were consolidated and both are at issue herein.

law judge found that claimant had established twenty-five years of coal mine employment and that the newly submitted evidence of record, although insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), was sufficient to establish that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) in the miner's claim in accordance with the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997).[2] The administrative law judge further found however, that the record as a whole failed to establish the existence of pneumoconiosis at Section 718.202(a), which precluded an award of benefits on both the living miner's claim and the survivor's claim. Accordingly, benefits were denied.

In the instant appeal, claimant generally contends that she is entitled to benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[3]

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. *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 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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[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of West Virginia. Director's Exhibit 53; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

[3]We affirm the administrative law judge's finding that claimant established a material change in conditions pursuant to 20 C.F.R. §718.204(c), as it is not adverse to claimant and is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

To establish entitlement to benefits under Part 718 in the miner's claim, claimant must demonstrate that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must prove that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.,* 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *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). The United States Court of Appeals for the Fourth Circuit has held that if pneumoconiosis hastens the miner's death in any way, it is a substantially contributing cause of death for purposes of Section 718.205(c)(2). *See Shuff, supra.*

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the newly submitted evidence did not establish the existence of pneumoconiosis or a material change in conditions pursuant to Sections 718.202(a) and 725.309(d). The administrative law judge considered the newly submitted x-ray readings, which include four readings which diagnosed the presence of pneumoconiosis, and forty-eight readings which found no evidence of pneumoconiosis, and rationally credited the readings of Dr. Wiot, who did not diagnose the presence of the disease, due to his extensive expertise and experience in this field. *See Trent, supra*; *Vance v. Eastern Associated Coal Corp.,* 8 BLR 1-68 (1985). The administrative law judge further rationally found Dr. Wiot's readings supported by the numerous negative readings of Drs. Spitz, Shipley, Wheeler and Sargent, and found that the preponderance of the readings was negative for the existence of pneumoconiosis. *See* Director's Exhibits 11-13; 21-24, 26, 29, 30, 40, 43, 44; Employer's Exhibit 1; Decision and Order at 3-5; *Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We therefore affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 718.202(a)(1).[4]

[4]The administrative law judge's failure to specifically discuss six x-ray readings of record which were not classified according to the ILO-U/C system does not constitute error inasmuch as such interpretations could not support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1). 20 C.F.R. §§718.102, 718.202(a)(1). Moreover, none of these x-ray readings diagnosed the existence of pneumoconiosis.

We also affirm the administrative law judge's finding that a material change in conditions was not established pursuant to 20 C.F.R. §718.202(a)(2)-(3) since none of the newly submitted biopsy reports diagnosed the presence of pneumoconiosis, the record contains no autopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this case where the living miner's claim was filed after January 1, 1982, there is no evidence of complicated pneumoconiosis, and the miner died after March 1, 1978.[5] Director's Exhibits 26-28; Decision and Order at 5. *Langerud v. Director, OWCP,* 9 BLR 1-101 (1986).

[5]The administrative law judge's failure to consider the biopsy reports of Drs. Bunnell and Sargent, neither of whom diagnosed the presence of pneumoconiosis, is harmless error since this evidence supports the administrative law judge's finding on this issue. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical reports and rationally determined that the preponderance of the evidence did not establish the presence of pneumoconiosis on the ground that Drs. Chandler, Fino, and Castle, who concluded that the miner did not have pneumoconiosis provided a more detailed rationale in support of their conclusions than Drs. Razzetti and Norris, both of whom diagnosed the disease. *See* Director's Exhibits 7, 8, 24, 32, 33, 43; Employer's Exhibits 2, 3; Decision and Order at 5-8; *Ondecko, supra; Trumbo, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Perry, supra; Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, we affirm the administrative law judge's finding that claimant's newly submitted evidence is insufficient to establish the presence of pneumoconiosis or a material change in conditions pursuant to Sections 718.202(a) and 725.309(d). *See Rutter*, *supra*. Remand to the administrative law judge to reconsider the newly submitted evidence under Section 718.202(a)(1)-(4) in accordance with the Fourth Circuit's recent decision in *Island Creek Coal Co. v. Compton,* 211 F.3d 203, BLR (4th Cir. 2000), is not necessary, as the administrative law judge properly determined that the existence of pneumoconiosis was not established under any of the relevant subsections.[6]

We further hold that substantial evidence supports the administrative law judge's finding that evidence of record, as a whole, failed to establish the existence of pneumoconiosis. The previously submitted evidence relevant to Section 718.202(a), includes two x-rays which diagnosed the presence of pneumoconiosis, four x-rays which found no evidence of pneumoconiosis, and numerous medical reports dated from November 6, 1967 to October 10, 1975. Dr. Futterman found a small amount of "dust disease" in 1967, and questioned whether the miner could receive "silicosis benefits." Dr. Rasmussen found significant pulmonary destruction consistent with occupational exposure in 1970, and Dr. Lesaca diagnosed pneumoconiosis in 1973. Director's Exhibit 74. The remaining eight medical reports document claimant's treatment for heart disease, chronic bronchitis, and numerous other non-respiratory conditions, but do not make any diagnoses regarding the presence of pneumoconiosis. *Id*.

[6]In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), the Fourth Circuit recognized that 20 C.F.R. §718.202(a)(1)-(4) provides alternative methods for establishing the existence of pneumoconiosis, but held that in determining whether the evidence is sufficient to support a finding of pneumoconiosis, all relevant evidence must be weighed together.

Although the administrative law judge did not specifically list each piece of previously submitted evidence, as the summary set forth above indicates, the record supports his determination that the preponderance of the x-ray readings and the medical reports do not establish this element of proof. Moreover, the administrative law judge also permissibly gave more weight to the newly submitted evidence of record that is fifteen years more recent than the evidence previously submitted, on the grounds that it was more probative of the miner's condition and Drs. Chandler, Fino and Castle also reviewed the earlier evidence in the well-reasoned and documented opinions in which they stated that the miner did not have pneumoconiosis. *See Ondecko, supra; Compton, supra; Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Perry, supra.* As the administrative law judge has provided a rational basis for his determination, we affirm his finding that the record as a whole is insufficient to establish the existence of pneumoconiosis, which comports with the decision of the Fourth Circuit in *Compton* and precludes an award of benefits in the living miner's claim. *See Compton*, *supra*; *Trent*, *supra*. Moreover, since claimant has failed to establish the threshold requirement for entitlement in a survivor's claim, we affirm the finding that claimant is ineligible for benefits pursuant to Section 718.205. *See Shuff, supra; Trumbo, supra; Neeley, supra.*

Accordingly, the Decision and Order of the administrative law judge denying benefits in the living miner's claim, and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge