BRB No. 00-0914 BLA

MARGARET A. CAPPS (Widow of CHARLES K. CAPPS)	)	
Claimant-Petitioner	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.) Pineville, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1215) of Administrative Law Judge John C. Holmes 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).[1] In this survivor's claim, the administrative law judge credited the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

miner with thirty-eight and one-quarter years of coal mine employment, but found the evidence of record insufficient to establish the existence of pneumoconiosis and death due to pneumoconiosis.[2] Accordingly, benefits were denied. On appeal, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis and death due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations

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refer to the amended regulations.

[2] Claimant is the widow of the deceased miner, Charles Capps, who died on September11, 1998. Director's Exhibits 1, 11. The miner filed two claims for benefits. The first was filed October 19, 1971, and denied June 24, 1981, when the district director found that although the miner established the existence of pneumoconiosis arising out of coal mine employment, he did not show that it was totally disabling. Director's Exhibit 25. The miner filed his next claim on February 4, 1992, which was denied on June 6, 1992, because the miner failed to establish a material change in conditions. Director's Exhibit 26.

[3] We affirm the findings of the administrative law judge on the length of coal mine employment and at 20 C.F.R. §§718.202(a)(2), (3)(2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded.[4] Based on the responses from the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

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 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, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4thCir. 1992), *cert. denied* 113 S.Ct. 969 (1993).

Claimant first asserts that because the miner established the existence of

[4] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

pneumoconiosis in his prior claims, employer may not contest the issue now. Since neither of the miner's prior claims resulted in an award of benefits, however, the existence of pneumoconiosis was not essential to the judgement denying benefits, and employer is not estopped from challenging the existence of pneumoconiosis. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

In the instant case, the administrative law judge accorded less weight to Dr. Rasmussen's opinion, that the miner suffered from pneumoconiosis, because the positive x-ray relied on by Dr. Rasmussen was disputed. Decision and Order at 10. The administrative law judge credited the opinion of Dr. Fino, that claimant did not have pneumoconiosis although Dr. Fino relied on disputed x-rays, because he also discussed the absence of any correlating objective test data, as support for his finding that the miner did not have pneumoconiosis. *Id*. Thus, the administrative law judge accorded greater weight to the opinion of Dr. Fino because Dr. Fino did not base his opinion entirely upon the x-rays and history of coal mine employment, as support for his diagnosis. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant also contends generally that the administrative law judge erred in allowing employer "to submit the usual number of negative x-ray readings...and then use those reports as the primary basis for the standard opinions of its physicians that [the miner] did not suffer from pneumoconiosis...." Claimant's Brief at 6. Specifically, claimant argues that the regulations prohibit denial of a claim based solely on negative x-ray readings and a physician's opinion which relies primarily on those readings cannot be credited. Contrary to claimant's argument, however, as the administrative law judge noted, Dr. Fino did not rely solely on negative x-rays, but the absence of other data supportive of a finding of pneumoconiosis. Moreover, the burden rests on claimant to establish the elements of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant also argues that the administrative law judge failed to weigh together all of the evidence relevant to the existence of pneumoconiosis, rather than separately at each subsection of the regulation set forth at 20 C.F.R. § 718.202(a)(1)-(4), as required by the recent holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000). In the instant case, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis by x-ray evidence, 20 C.F.R. §718.202(a)(1), and also failed to establish the existence of pneumoconiosis through the

medical opinion evidence, 20 C.F.R. §718.202(a)(4). Inasmuch as claimant failed to establish the existence of pneumoconiosis by either x-ray or medical opinion evidence, weighing both types of evidence already found to be insufficient to establish the existence of pneumoconiosis would not avail claimant any further opportunity to establish benefits. Thus, because the administrative law judge permissibly found the evidence insufficient to establish the existence of pneumoconiosis at each subsection of Section 718.202(a), consideration of all of the evidence together is not necessary. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the finding of the administrative law judge that claimant failed to establish the existence of pneumoconiosis, 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement and a threshold finding for establishing death due to pneumoconiosis, *Trumbo, supra*, and further affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law. In light of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, we need not address claimant's argument concerning death due to pneumoconiosis. *Trumbo, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge