

BRB Nos. 07-0797 BLA
and 07-0797 BLA-A

B. J. H.)	
(Widow of G. B. H.))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
v.)	DATE ISSUED: 06/26/2008
)	
RAWL SALES & PROCESSING)	
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals, and employer cross-appeals, the Decision and Order Denial of Claim (05-BLA-5612) of Administrative Law Judge Daniel F. Solomon rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

¹ Claimant is the widow of the deceased miner, who died on February 10, 2002. Director's Exhibit 8.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge credited the miner with twenty-five years of coal mine employment³ based on the parties' stipulation. Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that, pursuant to the standard enunciated in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the CT scan evidence did not establish the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. On cross-appeal, employer contends that the administrative law judge erred by excluding relevant medical evidence as exceeding the evidentiary limitations pursuant to 20 C.F.R. §725.414, and erred in considering three, rather than four, CT scan interpretations. Employer states that the issues raised in its cross-appeal need not be considered if the denial is affirmed, and thus, should be addressed only if the denial of benefits is vacated. Claimant responds, contending that the administrative law judge properly excluded the evidence pursuant to 20 C.F.R. §725.414, and that any error regarding the number of CT scans was harmless. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to this appeal.⁴

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,

² Claimant filed her claim for survivor's benefits on March 17, 2004. Director's Exhibit 2. The district director denied benefits in a Proposed Decision and Order dated December 23, 2004. Director's Exhibit 25. Claimant requested a hearing before the Office of Administrative Law Judges, and a hearing was held on March 15, 2007. Director's Exhibit 30.

³ The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further note that, although the administrative law judge did not make a finding pursuant to 20 C.F.R. §718.202(a)(3), the record contains no evidence of complicated pneumoconiosis.

and 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).

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c), 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(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 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)(2), (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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in his analysis of Dr. Narra’s CT scan report, and thus, erred in finding that the miner failed to establish the existence of pneumoconiosis. Dr. Narra, a B reader and Board-eligible radiologist, read the chest CT scan dated September 26, 2001, and found, “Both lungs reveal multiple variable sized nodular lesions secondary to metastatic disease. Also large hiatal hernia is noted. However, patient has had diffused interstitial fibrosis with small nodular opacities 1 to 3 mm in sizes in both lungs with mild profusion secondary to pneumoconiosis. Pleural spaces appear to be clear. Also extensive metastatic disease is identified in the liver.” Claimant’s Exhibit 1. Under “impression,” Dr. Narra listed: “1. extensive metastatic disease involving the lungs and liver, 2. large hiatal hernia, 3. diffused interstitial fibrosis with small round opacities most likely on the base [sic] of pneumoconiosis with given history of prior exposure to coal dust.” *Id.* Dr. Zaldivar, a B reader, read the same scan as negative for pneumoconiosis. Employer’s Exhibit 3. Additionally, Dr. Zaldivar read the April 23, 2001, June 15, 2001 and July 23, 2001 CT scans as negative for pneumoconiosis. *Id.* When deposed, Dr. Zaldivar testified that, in order to properly diagnose pneumoconiosis, one should review the series of CT scans, rather than one isolated scan. Employer’s Exhibit 5 at 11-12.

The administrative law judge found that even if he accorded Dr. Narra’s opinion greater weight based on his qualifications as a B reader with a specialty in radiology, Dr. Narra’s positive reading, “standing alone” was insufficient to establish the existence of pneumoconiosis “in light of the other three negative readings.” Decision and Order at 7. The administrative law judge specifically found that, although claimant failed to support Dr. Narra’s findings with “testimony or other evidence attesting to the reliability and medical acceptability of the CT scan,” employer “supplied the required elements of validity and regularity and acceptance of the medical community” through Dr. Zaldivar’s

deposition. *Id.* at 8; *see* 20 C.F.R. §718.107. Further, the administrative law judge was persuaded by Dr. Zaldivar’s testimony that the series of CT scans should have been evaluated, and determined that the one reading by a better qualified reader should not be dispositive. *Id.* The administrative law judge concluded that, after review of all the evidence pursuant to *Compton*, 211 F.3d 203, 22 BLR at 2-162, including the negative CT scans and medical reports submitted by employer, the existence of pneumoconiosis was not established by a preponderance of the evidence.

Claimant contends that the administrative law judge’s finding that the existence of pneumoconiosis could not be established on the basis of an isolated CT scan, where there is a series of CT scans, is not supported by substantial evidence, as Dr. Narra considered multiple CT scans. Specifically, claimant notes that Dr. Narra listed “Multiple Dates” as the “Date-of-Exam,” and “Re-Read CT Chest(s)” as the examination performed, in his radiology report. Claimant’s Exhibit 1. Claimant’s contention lacks merit, however, as above the narrative of the report, appears only “CT Chest Performed on 9-26-01,” and there is no reference to any other CT scan. We conclude, therefore, that substantial evidence supports the administrative law judge’s finding that Dr. Narra interpreted only the September 26, 2001 CT scan. We therefore affirm the administrative law judge’s finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), pursuant to *Compton*, 211 F.3d at 203, 22 BLR at 2-162.

Because the administrative law judge properly found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement in a survivor’s claim pursuant to 20 C.F.R. Part 718, a finding of entitlement thereunder is precluded.⁵ *See Trumbo*, 17 BLR at 1-85; *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. We therefore affirm the denial of benefits. Additionally, in view of our decision to affirm the denial of benefits, we need not address employer’s cross-appeal alleging that the administrative law judge erred in excluding certain evidence, and overlooked an additional CT scan reading.

⁵ Additionally, we note that the record contains no evidence to support a finding that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The miner’s death certificate attributed the miner’s death to lung cancer with metastasis to the liver, and listed no other causes or conditions. Director’s Exhibit 8. Drs. Castle and Zaldivar opined that the miner died solely due to cancer unrelated to coal dust exposure. Employer’s Exhibit 2-5. Further, the record contains no evidence of complicated pneumoconiosis, and thus, the irrebuttable presumption of death due to pneumoconiosis is unavailable to claimant. *See* 20 C.F.R. §718.205(c)(3).

Accordingly, the administrative law judge's Decision and Order Denial of Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge