

BRB No. 07-0833 BLA

S.H. (o/b/o and)
Widow of D.H.))
)
Claimant-Petitioner)
)
v.)
)
ASHER TRUCKING, INCORPORATED)
)
and)
)
EMPLOYER'S INSURANCE OF WAUSAU) DATE ISSUED: 06/27/2008
)
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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5685) of Administrative Law Judge Robert D. Kaplan on a miner's claim and a survivor's claim¹ 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 administrative law judge credited the parties' stipulation that the miner worked in qualifying coal mine employment for twenty-one years. Adjudicating both the miner's and survivor's claims pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) in the miner's claim, and failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivor's claim. Accordingly, the administrative law judge denied benefits on both claims.

On appeal, claimant argues that the administrative law judge erred in failing to find pneumoconiosis established by x-ray and medical opinion evidence under Section 718.202(a)(1) and (4), in failing to find total respiratory disability under Section 718.204(b)(2)(iv), and in failing to find that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.²

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 the applicable law, they are binding upon this Board and

¹ Claimant is the widow of the miner. The miner filed a claim for benefits on November 19, 2001. Director's Exhibit 2. While his claim was pending, the miner died on October 12, 2004. Director's Exhibit 54. Subsequently, claimant filed a survivor's claim for benefits on January 21, 2005. Director's Exhibit 46. Both claims are presently pending on appeal.

² We affirm the administrative law judge's findings with respect to the length of the miner's coal mine employment, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2, 9, 13-14.

may not be disturbed.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor’s 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In challenging the administrative law judge’s finding that claimant failed to establish pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical weight of x-ray interpretations. Claimant further contends that the administrative law judge “may have selectively analyzed” the x-ray evidence.

Contrary to claimant’s argument, where x-ray evidence is in conflict, consideration *shall* be given to the readers’ radiological qualifications. 20 C.F.R. §718.202(a)(1) [emphasis added]. In this case, the administrative law judge considered

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant’s coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 3.

the radiological expertise of the physicians and properly accorded greater weight to the negative interpretations of those physicians who were Board-certified radiologists and/or B readers, namely Drs. Scatarige, Scott, and Poulos, and permissibly accorded less weight to the sole positive interpretation rendered by Dr. Hussain, who possessed no demonstrated radiological expertise.⁴ 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10-11. Because the administrative law judge's determination to accord dispositive weight to the negative interpretations rendered by the physicians with superior, demonstrated radiological qualifications was rational and supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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). In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence because claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. See *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004). Accordingly, we affirm the administrative law judge's determination that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); see *Staton*, 65 F.3d 55, 19 BLR 2-271; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994).

In challenging the administrative law judge's determination pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in failing to credit the medical opinion of Dr. Hussain, who evaluated the miner on behalf of the Department of Labor and diagnosed coal workers' pneumoconiosis, and the medical opinion of Dr. Hays, who diagnosed chronic obstructive pulmonary disease, emphysema, bronchitis, and pneumonia during his treatment of the miner. Claimant additionally contends that, pursuant to 20 C.F.R. §718.104(d), the administrative law judge erred in failing to accord determinative weight to the opinion of Dr. Hays, based on his status as the miner's treating physician.

⁴ Under his summary of the x-ray evidence of record, the administrative law judge listed Dr. Hussain as a B reader. Decision and Order at 8. However, a review of the record reveals that Dr. Hussain indicated on his x-ray report dated January 9, 2002 that he is neither Board-certified nor Board-eligible in radiology, nor is he a B reader. Director's Exhibit 12.

The administrative law judge determined that the probative value of Dr. Hussain's opinion, which was based on x-ray findings, the miner's history of coal dust exposure, and objective test results, was undermined because Dr. Hussain relied on an x-ray interpretation that was subsequently reread as negative by a physician with superior radiological expertise and failed to provide any alternative rationale or basis supporting his diagnosis of pneumoconiosis. Hence, the administrative law judge's determination that Dr. Hussain's opinion was insufficiently documented and unreasoned was rational. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*) (administrative law judge must consider evidence which calls into question reliability of tests upon which physician's opinion is based in determining whether report is documented and reasoned); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 11.

With respect to the opinion of Dr. Hays, the administrative law judge summarized the findings and conclusions contained in Dr. Hays's treatment reports in the evidentiary record for the period he treated the miner from October 23, 1996 to September 21, 2004. Decision and Order at 4-7; Director's Exhibit 56; Employer's Exhibit 5. The administrative law judge, however, properly did not address Dr. Hays's opinions in his analysis of the medical evidence as Dr. Hays did not render an opinion as to whether the miner suffered from either clinical or legal pneumoconiosis.⁵ *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003) (noting that Section 718.104(d) does not call for automatic acceptance of treating physician's opinion); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 510-511, 22 BLR 2-625, 2-641-642 (6th Cir. 2003). Consequently, we reject claimant's argument that the administrative law judge erred in not assessing the credibility of the opinion of Dr. Hays, the miner's treating physician, pursuant to the factors articulated in Section 718.104(d).

Instead, the administrative law judge credited the opinions of Drs. Rosenberg and Fino diagnosing chronic obstructive pulmonary disease due to emphysema and cigarette smoking. Employer's Exhibits 1, 11. The administrative law judge found that the opinions of Drs. Rosenberg and Fino were well-reasoned and documented because Dr.

⁵ The administrative law judge noted Dr. Hays's report dated January 19, 2004 where he diagnosed chronic obstructive pulmonary disease and bronchitis. Director's Exhibit 56. Dr. Hays did not, however, indicate an etiology of either pulmonary condition. Therefore, Dr. Hays's opinion is insufficient to establish the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Rosenberg submitted a documented report detailing his physical examination findings, the miner's coal mine employment and cigarette smoking histories, an x-ray reading, and diagnostic test results and Dr. Fino, likewise, relied on an extensive review of the miner's medical records. Accordingly, the administrative law judge permissibly concluded that these physicians' opinions, that the miner did not suffer from pneumoconiosis, were entitled to substantial weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 11.

Because claimant has not otherwise challenged the administrative law judge's credibility determinations, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. Because claimant has failed to satisfy her burden to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded.⁶ *See* 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

⁶ Claimant's failure to establish the existence of pneumoconiosis, a requisite element of entitlement in both the miner's and the survivor's claims, obviates the need to address her arguments that the administrative law judge erred in failing to find total disability under Section 718.204(b)(2)(iv) in the miner's claim and death due to pneumoconiosis under Section 718.205(c) in the survivor's claim. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge