BRB No. 07-0843 BLA

C.L.F. (Widow of D.C.F.) Claimant-Petitioner v. U.S. STEEL CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/30/2008 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Stephen L. Purcell, Associate Chief Administrative Law Judge, United States Department of Labor.

Robert M. Williams (Maroney, Williams, Weaver & Pancake, PLLC), Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (2004-BLA-06549) of Associate Chief Administrative Law Judge Stephen L. Purcell denying benefits on a survivor's claim filed

[1] Claimant is the surviving spouse of the deceased miner, D.C.F., who died on May 23, 2003. Decision and Order at 2; Director's Exhibit 10. The death certificate lists the immediate cause of death as chronic lymphocytic leukemia due to pancytopenia. Director's Exhibit 10.

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 miner with approximately thirty-eight years of qualifying coal mine employment. Based on the date of filing, the administrative law judge considered entitlement pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1),(2),(4), 718.203(b), but insufficient to demonstrate the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), 718.304. The administrative law judge also found that claimant failed to establish that pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant specifically challenges the administrative law judge's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and generally challenges the administrative law judge's finding that pneumoconiosis did not contribute to the miner's death pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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, and in accordance with applicable law.[2] 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *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). A miner's death will be considered to be due to pneumoconiosis if the presumption set forth at 20 C.F.R.

[2] The record indicates that the miner was employed in the coal mining industry in West Virginia. Director's Exhibit 2. 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 (1989)(*en banc*).

§718.304 is applicable. *See* 20 C.F.R. §§718.205(c)(3), 718.304. Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(1), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the evidence establishes complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see* 20 C.F.R. §718.205(c)(3); *see also Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). In order to determine whether a claimant has established the existence of complicated pneumoconiosis, the administrative law judge must weigh together all of the relevant evidence at 20 C.F.R. §718.304(a)-(c).[3] *See Gray*, 176 F.3d at 389, 21 BLR at 2-629; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Claimant contends that the administrative law judge did not properly consider the autopsy report of Dr. Imbing and the reports of Drs. Rasmussen and Bush in considering

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[3] 20 C.F.R. §718.304 provides in relevant part that:

> There is an irrebuttable presumption that…a miner's death was due to pneumoconiosis...if such miner...suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 (emphasis in original).

whether the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). We disagree. Dr. Imbing, the autopsy prosector, concluded that the lungs revealed "complicated pneumoconiosis (multiple coal dust nodules measuring 0.3 to 2.2 centimeters in greatest diameter)." Director's Exhibit 12. Dr. Rasmussen examined the miner on July 19, 1995 and, based on an x-ray reading, diagnosed coal workers' pneumoconiosis. Director's Exhibit 2. Dr. Rasmussen issued a supplemental report dated August 8, 2005, in which he reviewed multiple records and Dr. Imbing's autopsy findings and concluded that, based on the miner's 32 years of coal mine employment and Dr. Imbing's diagnosis of complicated pneumoconiosis, the evidence indicates that the miner suffered from complicated coal workers' pneumoconiosis. Claimant's Exhibit 1. Dr. Bush, who reviewed histologic slides, the autopsy report, medical records and the death certificate, disagreed with Dr. Imbing's conclusions and opined that the lesions were all less than one centimeter and there was no evidence of progressive massive fibrosis or complicated pneumoconiosis. Employer's Exhibit 1.

The administrative law judge gave more weight to the opinion of Dr. Bush diagnosing simple pneumoconiosis, but not complicated pneumoconiosis based on his "superior qualifications in pathology" and "because Dr. Bush provided a more thorough analysis of the evidence."[4] Decision and Order at 13-14. The administrative law judge also found that Dr. Bush's opinion "is more consistent with the miner's medical records prior to death" and was thus "most persuasive." Decision and Order at 14. The administrative law judge found that Dr. Rasmussen's supplemental report was "rather cursory" and did not provide a well-reasoned pulmonary analysis. *Id*. We affirm the administrative law judge's finding that complicated pneumoconiosis was not established as it is rational and supported by the evidence of record. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-562.

Contrary to claimant's contention, the administrative law judge was not required to apply the "true doubt" rule in assessing the evidence and determining whether claimant was entitled to benefits.[5] The United States Supreme Court has held that the application

[4] The administrative law judge acknowledged that Dr. Bush is Board-certified in Anatomical & Clinical Pathology, Dr. Rasmussen is Board-certified in Internal Medicine and noted that Dr. Imbing's curriculum vitae is not in the record. Employer's Exhibit 1; Claimant's Exhibit 1.

[5] The concept of "true doubt" had been applied when equally probative but contradictory evidence was presented in the record such that the selection of one set of facts would have resolved the case against the claimant, but selection of the contradictory set of facts would have resolved the case for the claimant. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Provance v. United States Steel Corp.*, 1 BLR 1-483 (1978).

of the true doubt rule violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), as it relieves claimants of their burden of proof in establishing entitlement to benefits. *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). Accordingly, contrary to claimant's contention, the administrative law judge did not apply an improper standard in considering whether claimant established entitlement to benefits. The submission of a medical report that satisfies all elements of entitlement does not automatically entitle claimant to an award of benefits. Rather, the administrative law judge must determine the credibility of the evidence of record and the weight to be accorded the evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *see also Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

Moreover, we affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) as claimant does not challenge the administrative law judge's finding with any specificity. Claimant asserts that Dr. Imbing's opinion was sufficient to establish the existence of complicated pneumoconiosis, but does not identify any error made by the administrative law judge in his evaluation of the medical opinion evidence and applicable law pursuant to Part 718. Rather, claimant argues that Drs. Imbing's and Rasmussen's diagnoses of complicated pneumoconiosis are sufficient to invoke the irrebuttable presumption of death due to pneumoconiosis. In light of our decision to affirm the administrative law judge's finding that claimant has not established the existence of complicated pneumoconiosis, we reject this contention. Because claimant does not otherwise challenge the administrative law judge's finding that she has not established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), it is affirmed. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Consequently, because claimant has not met her burden of proof on an essential element of entitlement under 20 C.F.R. Part 718 in this survivor's claim, an award of benefits is precluded. 20 C.F.R. §718.205(c); *Trumbo*, 17 BLR at 1-87.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge