BRB No. 07-0849 BLA

M.J. (Widow of G.J.) Claimant-Petitioner v. LEECO, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/27/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

M.J., Benham, Kentucky, *pro se*.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-BLA-05472) of Administrative Law Judge Robert D. Kaplan

[1] Claimant is the widow of the miner, G.J., who died on September 29, 1999. Director's Exhibit 8. Claimant filed her survivor's claim on March 11, 2005. Director's Exhibit 2.

with respect to 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). The administrative law judge credited the miner with twelve years of qualifying coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, the administrative law judge found that because claimant failed to establish the existence of pneumoconiosis, she cannot show that the miner's death was due pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 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 caused the miner's death, or 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)(1)-(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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.202(a)(1), the administrative law judge found that because none of the x-ray evidence of record was in compliance with the regulations set forth at 20 C.F.R. §718.102(b) and Appendix A of Part 718, the x-ray evidence was insufficient to establish the presence, or absence, of pneumoconiosis.[3] Decision and Order at 6. We affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as it is rational and supported by substantial evidence.[4] 20 C.F.R. §§718.102(b), (e), 718.202.

[3] Subsections 718.102(b) and (e) state, in pertinent part:

> (b) A chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the pneumoconioses (ILO-U/C 1971), or subsequent revisions thereof. ….
>
> (e) … no chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of this section and Appendix A.

20 C.F.R. §718.102(b), (e).

[4] The record contains an interpretation by Dr. Simmons of an x-ray dated September 25, 1989. Director's Exhibit 13. Dr. Simmons provided a reading of "a q/q 0/1 to boundary 1/0 profusion." *Id*. However, Dr. Simmons further stated that this could represent tiny focal areas of pneumonia, interstitial pneumonia or a dust inhalation disease and recommended a comparative study when the miner was asymptomatic. *Id*. Because Dr. Simmons did not unequivocally set forth an ILO classification considered positive for pneumoconiosis, his reading does not conflict with the administrative law judge's ultimate finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(2), the administrative law judge considered the autopsy report of Drs. Cibull and Schott, and the consultative report of Dr. Caffrey. Drs. Cibull and Schott, the autopsy prosectors, in their "Microscopic Examination" review, state that the representative sections of the lungs show "anthasilicosis [sic], mild interstitial fibrosis and central lobular emphysema, consistent with simple coal workers pneumoconiosis."[5] Director's Exhibit 10. In their final anatomic diagnoses, Drs. Cibull and Schott diagnosed anthrasilicosis consistent with simple coal workers' pneumoconiosis. *Id.* Dr. Caffrey reviewed the autopsy slides and report of Drs. Cibull and Schott, and opined that there was a mild to moderate degree of anthracotic pigment or coal dust, but that he did not see "the lesions of coal workers' pneumoconiosis, that is coal dust or anthracotic pigment with reticulin and focal emphysema." Employer's Exhibit 5. Dr. Caffrey concluded that he did not see any definitive evidence of pneumoconiosis.[6] *Id*.

Weighing the autopsy evidence, the administrative law judge determined that Dr. Caffrey's opinion, that there is no definitive evidence of pneumoconiosis, outweighed the opinion of the autopsy prosectors, Drs. Cibull and Schott, because their report contains no description of the findings supporting a diagnosis of anthrasilicosis, mild interstitial fibrosis and central lobular emphysema. Director's Exhibit 10. The mere fact that a pathologist performed the autopsy does not mandate assigning controlling weight to that medical diagnosis; rather, the administrative law judge must assess the credibility of the prosector along with the other medical experts. *See Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1984). In this case, the administrative law judge permissibly found that while the autopsy prosectors diagnosed the presence of anthrasilicosis, mild interstitial fibrosis and central lobular emphysema, they failed to adequately explain what findings on examination supported their conclusions and, therefore, rationally accorded their opinion little weight. 20 C.F.R. §718.201; s*ee Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v.*

[5] Drs. Cibull and Schott, in the autopsy report's "Gross Description," stated that "the lungs together weigh 1500 grams and contain extensive adhesions on the pleural surface. They are brown gray in color and spongy in consistency. On cut surface, the bronchi are tan and no pulmonary emboli are noted." Director's Exhibit 10.

[6] Dr. Caffrey reviewed five autopsy slides and the report of Drs. Cibull and Schott, and stated that there was a "mild to moderate degree of anthracotic pigment or coal dust, and the pigment is mostly prominent around blood vessels. I do not see the lesions of coal workers' pneumoconiosis, that is coal dust or anthracotic pigment with reticulin and focal emphysema." Employer's Exhibit 5. Dr. Caffrey further stated that the gross description of the lungs was not the description of lungs from an individual who has coal workers' pneumoconiosis. *Id.*

Island Creek Coal Co.. 10 BLR 1-19 (1987); Decision and Order at 7. Consequently, we affirm the administrative law judge's finding that the weight of the autopsy evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(2).[7]

The administrative law judge also correctly found that the claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3), as the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable to this claim.[8] *See* 20 C.F.R. §718.202(a)(3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 7.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Kenady, Rosenberg and Vuskovich, as well as the miner's treatment and hospitalization records.[9] Dr. Kenady, one of the miner's treating physicians for esophageal carcinoma, stated in a letter dated February 15, 2005, that he "would totally agree that [the miner] certainly had black lung disease" noting that the autopsy report clearly found changes consistent with pneumoconiosis.[10] Director's Exhibit 10. Dr. Rosenberg, in a consultative report dated December 26, 2006, opined that the miner did not have clinical or legal pneumoconiosis. Employer's Exhibits 1, 2. Specifically, Dr. Rosenberg discussed the findings on autopsy and stated that he did not believe they represented pneumoconiosis because there was no description of true coal

[7] Dr. Caffrey also diagnosed "centrilobular emphysema, moderate," however, he did not attribute this finding to coal dust exposure and, therefore, it is insufficient to establish the existence of pneumoconiosis. Employer's Exhibit 5.

[8]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 2. Lastly, because this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[9] The miner's death certificate, signed by Dr. Kenady, lists the cause of the miner's death as sepsis due to, or as a consequence of, pneumonia and esophageal carcinoma. Director's Exhibit 8.

[10] In a letter dated December 8, 2006, Dr. Kenady, in response to Dr. Caffrey's report, stated that he was an oncologist and surgeon, not a pathologist, and that although he stood by his opinion that the miner's life was shortened by his twenty-six years in the coal mines, he felt he was not qualified to critique the findings of two pathologists. Claimant's Exhibit 1.

macules or focal emphysema, which one would expect to see with the presence of simple coal workers' pneumoconiosis. *Id*. In addition, Dr. Rosenberg related the miner's moderate centrilobular emphysema to his history of cigarette smoking, and not to coal dust exposure, because it did not begin with focal emphysema, nor was it found around a coal macule. *Id.* Dr. Vuskovich, in a consultative report dated December 26, 2006, stated that "[t]he results of the ventilation-perfusion scan, the interpretation of the autopsy specimens, and his work history weigh in favor of a diagnosis of low-category simple coal workers' pneumoconiosis without passive [sic] massive fibrosis." Employer's Exhibit 3. In addition, he stated that there was no evidence that the miner had a disabling respiratory impairment and, with regard to the diagnoses of centrilobular emphysema by Drs. Cibull, Schott and Caffrey, Dr. Vuskovich stated that it is "the type found with coal workers' pneumoconiosis." *Id*. Therefore, in his conclusion, Dr. Vuskovich stated that the miner "probably had low-category clinical simple coal workers' pneumoconiosis. He did not have progressive massive fibrosis." *Id*.

Weighing this medical opinion evidence, the administrative law judge reasonably exercised his discretion in finding that the two opinions supportive of claimant's burden, those of Drs. Kenady and Vuskovich, were not reasoned or documented. Therefore, the administrative law judge rationally accorded these opinions less weight than the contrary opinion of Dr. Rosenberg. Decision and Order at 9-10. Specifically, the administrative law judge rationally found that Dr. Kenady's opinion was not reasoned or documented because the physician did not adequately explain the rationale for his conclusions, as he did not explain how the documentation supported his opinion. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003) (the opinions of treating physicians "get the deference they deserve based on their power to persuade."); Decision and Order at 9; Director's Exhibit 10. Similarly, the administrative law judge reasonably accorded little weight to Dr. Vuskovich's opinion, finding that the physician was not definitive in his conclusions but, rather, provided an equivocal diagnosis in opining that the miner "probably" had pneumoconiosis. In addition, Dr. Vuskovich provided no explanation of his statement that the centrilobular emphysema diagnosed on autopsy was of "the type found with coal workers' pneumoconiosis." *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 9; Employer's Exhibit 3. Rather, the administrative law judge reasonably found that Dr. Rosenberg's contrary opinion was reasoned and well-documented because it was based on the extensive review of the miner's treatment and hospitalization records and autopsy report and the evidence supports his conclusion; the administrative law judge, therefore, acted within his discretion in according Dr. Rosenberg's opinion substantial weight. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark*, 12 BLR at 1-152.

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7

BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. *Anderson*, 12 BLR at 1-112. Because the administrative law judge's findings are supported by substantial evidence, we affirm his finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Since claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, entitlement to benefits is precluded. *Griffith*, 49 F.3d 184, 19 BLR 2-111; *Trumbo*, 17 BLR at 1-87-88.

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge