BRB No. 07-0861 BLA

K. G. (Widow of C. G.) Claimant-Petitioner v. EASTERN COAL CORPORATION and THE PITTSTON COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/24/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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] appeals the Decision and Order Denying Benefits (05-BLA-5422) of Administrative Law Judge Alice M. Craft rendered 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). The administrative law judge credited the miner with twenty-one years of coal mine employment[2] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, accordingly, she denied benefits.

On appeal, claimant challenges the administrative law judge's analysis of the x-ray evidence pursuant to 20 C.F.R. §725.414 and §718.202(a)(1). Claimant additionally challenges the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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. 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

[1] Claimant is the widow of the miner, who died on July 1, 2001. Director's Exhibit 5. The miner's lifetime claims for benefits were finally denied, and are not before the Board in this appeal. Claimant filed the instant survivor's claim on September 26, 2001. Director's Exhibit 3.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was last employed in the coal mining industry in Kentucky. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc)*.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-one years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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); *see 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).

Relevant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered readings of thirty-one x-rays contained in the miner's treatment records, which were submitted by claimant, and eight conflicting readings of four x-rays designated as the parties' affirmative and rebuttal evidence. Specifically, Dr. Alexander, a Board-certified radiologist and B reader, interpreted x-rays dated August 21, 1998, October 9, 1998, December 29, 1998, and June 5, 2001, as positive for pneumoconiosis. Claimant's Exhibits 2-5. However, Dr. Wiot, who is also a Board-certified radiologist and B reader, interpreted the same x-rays as negative for pneumoconiosis. Director's Exhibit 33 at 6-9. In considering this evidence, the administrative law judge found:

> All 31 x-rays in evidence in this claim were taken during medical treatment. None of the Radiologists who interpreted the x-rays for the purpose of treatment made any mention of coal workers' pneumoconiosis. Nor did any mention findings pertaining to obstructive disease. Whether an x-ray interpretation which is silent as to pneumoconiosis should be interpreted as negative for pneumoconiosis, is an issue of fact for the ALJ to resolve. Many of the x-rays were characterized as showing a normal chest, clear lungs, or no active disease. I find all of those to be negative. One x-ray in April 1999, and several taken between November 2000 and June 2001 during the Miner's final illness, demonstrated fluid, infiltrates, effusion or, in one case, in April 2001, atelectasis. In view of the absence of any findings more pertinent to the presence of pneumoconiosis, however, I find that these x-rays, too, were negative for pneumoconiosis. . . .
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> Four of the x-rays were reread by dually qualified Radiologists and B readers. Dr. Alexander found all four to be positive for pneumoconiosis, 1/0, while Dr. Wiot found them to be negative. Dr. Wiot is pre-eminent in the field. *See* his Curriculum Vitae. Moreover, there is no support for Dr. Alexander's positive readings to be found in the [treatment record] readings . . . . Based on Dr. Wiot's superior qualifications, and the fact that I have found all of the other readings of those x-rays to be negative, I find that the overwhelming weight of the x-ray evidence is negative for pneumoconiosis.

Decision and Order at 20 (internal citations omitted).

Claimant alleges initially that the administrative law judge erred by "including the excessive and multiple x-ray reports in the treatment records in her analysis of the x-ray evidence," because they exceed the evidentiary limitations of 20 C.F.R. §725.414, and because they do not conform to the ILO-classification quality standards of 20 C.F.R. §718.202(a)(1). Claimant's Brief at 7-8. Claimant further asserts that, because Drs. Alexander and Wiot are equally qualified, the administrative law judge erred in finding the x-ray evidence to be negative for pneumoconiosis. Claimant's contentions lack merit.

Section 725.414(a)(4) provides that "any record of a miner's hospitalization for . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence," "notwithstanding the limitations" of Section 725.414(a)(2), (a)(3). 20 C.F.R. §725.414(a)(4). Claimant, by counsel, submitted the miner's hospitalization and medical treatment records pursuant to this provision.[4] Director's Exhibit 6. Therefore, the administrative law judge did not err in considering the x-ray readings that those records contained. *See* 20 C.F.R. §725.414(a)(4). Further, contrary to claimant's contention, the administrative law judge acted within her discretion in inferring that the x-ray readings that contained no mention of pneumoconiosis were negative for pneumoconiosis, notwithstanding the lack of a formally "negative" ILO classification.[5] *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984).

Moreover, even if claimant's contention regarding the non-conforming x-ray readings had merit, any error that the administrative law judge may have made in considering this evidence is harmless, as she acted within her discretion in finding Dr. Wiot's qualifications to be superior to those of Dr. Alexander, and rationally determined that the weight of the x-ray interpretations was negative for pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984)(holding that error that does not affect the disposition of the case is harmless). Although both Drs. Wiot and Alexander are Board-certified radiologists and B readers, in finding Dr. Wiot's qualifications to be superior, the administrative law judge permissibly considered Dr. Wiot's additional radiological qualifications. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302

[4] On appeal, there is no dispute that the records submitted by claimant constitute hospitalization or medical treatment records for a respiratory or pulmonary or related disease, within the meaning of 20 C.F.R. §725.414(a)(4).

[5] Claimant also contends that the administrative law judge erred by failing to determine whether the x-ray readings in the hospitalization records substantially comply with the quality standards of 20 C.F.R. §718.102. The quality standards only apply, however, to evidence developed in connection with a claim for benefits. Therefore, they are inapplicable to the hospitalization records in this case. *See* 20 C.F.R. 718.101(b); 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999).

(2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Moreover, substantial evidence supports her finding that Dr. Wiot's Curriculum Vitae demonstrated that "Dr. Wiot is pre-eminent in the field."[6] Consequently, the administrative law judge acted within her discretion in assigning greater weight to Dr. Wiot's x-ray readings. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant additionally asserts that the administrative law judge failed to offer a valid reason for discounting the opinions of Drs. King and Musgrave pursuant to 20 C.F.R. §718.202(a)(4). Specifically, claimant asserts that Dr. King's opinion constitutes a reasoned and documented diagnosis of legal pneumoconiosis, because his diagnosis of COPD and restrictive lung disease due to coal dust exposure is based on a physical examination, the miner's complaints of shortness of breath, and a pulmonary function study dated December 12, 2000, which revealed both obstructive and restrictive lung disease. Claimant's Brief at 12-13. Claimant similarly asserts that Dr. Musgrave's diagnosis of black lung disease is reasoned and documented, because Dr. Musgrave also based her opinion on the December 12, 2000 pulmonary function study. *Id.* at 14. Based on these allegations of error, claimant contends that the administrative law judge's findings at Section 718.202(a)(4), are flawed and must be vacated. We disagree.

In discounting the opinions of Drs. King and Musgrave, who were the miner's treating physicians, the administrative law judge explained that their opinions were not adequately documented and reasoned:

> Although Dr. King treated the Miner for a lung condition with inhalers and other medication, there is nothing in Dr. King's records which gives any indication how Dr. King made the diagnosis of black lung disease, or COPD due to coal dust exposure. Neither the x-ray reports nor the CT scan reports described manifestations of either COPD or CWP; chest examinations were clear until after recurrence of the Miner's cancer in late 2000; and the notes mention only occasional complaints of shortness of breath. Indeed, Dr. King's records are bereft of diagnostic information or functional testing as to the condition of the Miner's lungs . . . . As I cannot determine the basis for Dr. King's opinion that the Miner had black lung disease, I cannot give his opinion substantial weight.

[6] Claimant does not specifically challenge this finding as to Dr. Wiot's additional radiological qualifications. It is therefore affirmed. *Skrack*, 6 BLR at 1-711.

> Dr. Musgrave's opinion suffers from the same defects as Dr. King's. Dr. Musgrave's office and hospital records indicate that the focus of his treatment of the Miner was esophageal cancer. Although he stated in his letter that the Miner was also treated for black lung, he said nothing about how the diagnosis was made. He referred to a pulmonary function test which revealed restrictive airway disease. However, he did not identify which test he was referring to . . . . As I cannot determine the basis for Dr. Musgrave's opinion that the Miner had black lung disease, I cannot give his opinion substantial weight, either.

Decision and Order at 22. Contrary to claimant's assertions, substantial evidence supports these findings. A review of Dr. King's opinion and treatment records does not disclose any reference to the December 12, 2000 pulmonary function study, nor any explanation as to how Dr. King was able to link claimant's COPD to coal dust exposure. Further, with respect to Dr. Musgrave, the administrative law judge accurately stated that Dr. Musgrave referred to an unspecified pulmonary function study, and she did not explain her diagnosis of black lung disease.[7] Therefore, the administrative law judge acted within her discretion in discounting the opinions of Drs. King and Musgrave. *See* 20 C.F.R. §718.104(d)(5); *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Moreover, although claimant additionally argues that the administrative law judge failed to adequately assess the reasoning of the contrary opinions of Drs. Fino and Rosenberg, because the administrative law judge permissibly discounted claimant's favorable evidence, any error that she may have made in crediting the opinions of Drs. Fino and Rosenberg is harmless. *See Larioni*, 6 BLR at 1-1278. Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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[7] Dr. Musgrave's opinion stated:

> [The miner] was treated for esophageal cancer and black lung disease. He underwent chemotherapy and radiation. . . . He did have a pleural biopsy, which was negative for tumor. He had a pulmonary function test which revealed restrictive airway disease. If he had not had black lung, he could have potentially handled the pleural effusion and respiratory insults better.

Director's Exhibit 6.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement in a survivor's claim under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27.

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