

BRB No. 07-0863 BLA

A.S.)
(Widow of J.S.))
)
)
Claimant-Petitioner)
)
v.)
)
CHANEY CREEK COAL CORPORATION) DATE ISSUED: 06/12/2008
)
and)
)
KENTUCKY COAL PRODUCERS SELF-)
INSURANCE FUND)
)
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-6078 and 05-BLA-6079) of Administrative Law Judge Donald W. Mosser denying benefits on claims 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). This case involves a miner's subsequent claim filed on December 20, 2001¹ and a survivor's claim filed on July 27, 2004. In regard to the miner's claim, the administrative law judge, after crediting the miner with at least six years of coal mine employment, found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's 1995 claim became final. Accordingly, the administrative law judge denied benefits on the miner's claim. In regard to the survivor's claim, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). In regard to the survivor's claim, claimant contends that the administrative law Judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

¹ The miner filed four previous claims. Director's Exhibits 1-3. The first claim, filed on August 8, 1989, was denied on January 16, 1990, because the miner did not establish any of the elements of entitlement. Director's Exhibit 1. The second claim, filed on June 29, 1992, was denied by Administrative Law Judge Donald W. Mosser on January 27, 1994, because the miner did not establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. *Id.* The third claim, filed on April 14, 1995, was denied by Administrative Law Judge Robert L. Hillyard on January 15, 1998, because the miner did not establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. *Id.* The Board affirmed Judge Hillyard's denial of benefits on January 26, 1999. [*J.S.*] *v. Chaney Creek Coal Corp.*, BRB No. 98-0614 BLA (Jan. 26, 1999) (unpub.). Although the miner subsequently filed a fourth claim on April 17, 2000, Administrative Law Judge Daniel J. Roeketenez, by Order dated November 19, 2001, approved the miner's request to withdraw this claim. Director's Exhibit 1. It is, therefore, deemed not to have been filed. 20 C.F.R. §725.306(b).

² Because no party challenges the administrative law judge's findings that the new evidence in the miner's subsequent claim did not establish the existence of

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The Miner’s Claim

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). The miner’s prior claim was denied because he did not establish that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director’s Exhibit 1. Consequently, claimant had to submit new evidence establishing either that the miner suffered from pneumoconiosis or that he was totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Section 718.202(a)(1)

Claimant contends that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The new x-ray evidence consists of two interpretations of an x-ray taken on March 6, 2002. Dr. Hussain, a physician without any special radiological qualifications, and Dr. Dahhan, a B reader, each interpreted the miner’s March 6, 2002 x-ray as negative for pneumoconiosis.³ Director’s Exhibits 8, 21. Because it is supported by substantial evidence, the administrative law judge’s finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Section 718.202(a)(4)

pneumoconiosis, or total disability, pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3), 718.204(b)(2)(i)-(iv), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Dr. Sargent, a B reader and Board-certified radiologist, interpreted the miner’s March 6, 2002 x-ray for quality purposes only. Director’s Exhibit 8.

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, claimant alleges no specific error in regard to the administrative law judge's consideration of the new medical opinion evidence.⁴ *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of the miner's prior claim. 20 C.F.R. §725.309.

The Survivor's Claim

Claimant contends that the evidence established that the miner's death was due to pneumoconiosis pursuant to C.F.R. §718.205(c). Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

The administrative law judge accurately noted that claimant did not submit any x-ray or medical opinion evidence in connection with her survivor's claim. Although

⁴ The record does not contain any new medical opinion evidence supportive of a finding of pneumoconiosis. The record contains only one new medical report. In a report dated March 6, 2002, Dr. Hussain diagnosed chronic obstructive pulmonary disease attributable to "tobacco abuse." Director's Exhibit 8. Dr. Hussain opined that the miner did not suffer from an occupational lung disease caused by his coal mine employment. *Id.*

claimant submitted autopsy evidence, the administrative law judge properly found that this evidence, which made no mention of pneumoconiosis, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).⁵ Decision and Order at 8; Director's Exhibit 32. Consequently, the administrative law judge found that the evidence in the survivor's claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202. Additionally, because claimant does not challenge the administrative law judge's finding that the evidence in the survivor's claim did not establish the existence of pneumoconiosis, this finding is affirmed.⁶ *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ In his autopsy report, Dr. Lehman diagnosed *inter alia*, arteriosclerotic and hypertensive cardiovascular disease, emphysematous changes in the lungs, and severe bilateral pleural adhesions. Director's Exhibit 32.

⁶ The evidence of record is insufficient, as a matter of law, to support a finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Dr. Lehman is the only physician of record to address the cause of the miner's death. Dr. Lehman attributed the miner's death to arteriosclerotic and hypertensive cardiovascular disease. Director's Exhibits 31, 32. Dr. Lehman did not list pneumoconiosis as either an immediate or contributory cause of the miner's death. *Id.* Additionally, because there is no evidence in the record supportive of a finding of complicated pneumoconiosis, claimant is precluded from establishing entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge