BRB No. 97-1517 BLA

ERVA JEAN VARNEY (Widow of BILLIE E. VARNEY) Claimant-Petitioner v. IKE COAL COMPANY Employer- Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Miller Kent Carter (Branham & Carter), Pikeville, Kentucky.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the surviving spouse of a deceased miner, appeals the Decision and Order - Denial of Benefits (95-BLA-2090) of Administrative Law Judge Daniel J. Roketenetz with respect to a miner's claim and 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).[1] The administrative law judge credited the miner with seventeen years of coal mine employment and noted that the miner filed two applications for benefits during his lifetime. The first claim was filed on September 15, 1980, and was denied by the district director on

[1]The miner died on October 10, 1992. The coroner identified "carcinoma of the lung, due to or as a consequence of black lung disease," as the cause of death. Director's Exhibit 51.

April 9, 1981, on the ground that the miner failed to prove that his pneumoconiosis arose out of coal mine employment. Director's Exhibit 115. Following transfer of the case to the Office of Administrative Law Judges, the case was remanded to the district director for reconsideration in light of the award of workers' compensation by the State of Kentucky. *Id.*. After an informal conference, the miner stipulated that he would not continue to pursue his claim for federal benefits. *Id.*. The miner filed a second application for benefits on June 24, 1991.

Based upon the standard adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge determined that a material change in conditions was established with respect to the miner's claim pursuant to 20 C.F.R. §725.309.[2] The administrative law judge found that the miner was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his alleged pneumoconiosis arose out of coal mine employment and that there was no evidence which rebutted this presumption.

Regarding the merits of both the miner's claim and the survivor's claim, the administrative law judge determined that the evidence of record was insufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that even assuming that the existence of pneumoconiosis was established, claimant did not prove that the pneumoconiosis caused or contributed to the miner's death under 20 C.F.R. §718.205(c). Accordingly, benefits were denied with respect to both claims. Claimant argues on appeal that the administrative law judge did not properly weigh either the x-ray evidence or the medical reports of record. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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 supported by substantial evidence, is rational,

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment occurred in Kentucky. Director's Exhibits 4, 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). In *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the court held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a claimant must prove at least one of the elements of entitlement previously adjudicated against him.

and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantial contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the present case arises, has held that, for the purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death where pneumoconiosis actually hastens death. *See Brown v. Rock Creek Mining Co., Inc.,* 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In order to establish entitlement to benefits under Part 718 with respect to the miner's claim, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trumbo*, *supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Turning first to the administrative law judge's findings under Section 718.205(c)(1) and (c)(2), claimant contends that the administrative law judge failed to consider properly the death certificate and the report of Dr. Myers. Claimant also states that the reports of Drs. Caffrey and Naeye support a finding that pneumoconiosis contributed to the miner's death. These contentions are without merit. The administrative law judge acted within his discretion in finding that the opinion expressed on the death certificate prepared by Dalton Wyatt, the coroner for the county in which the miner died, was insufficient to establish that pneumoconiosis caused or contributed to the miner's demise, as it was outweighed by the contrary opinions of more qualified physicians. Decision and Order at 19; Director's Exhibits 51, 99; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge's finding is supported by substantial evidence, as Drs. Kleinerman, Caffrey, and Naeye are Board-certified pathologists and Dr. Lane is Board-certified in Internal Medicine. Employer's Exhibit 3. Mr. Wyatt's qualifications are not of record and although both the administrative law judge and claimant refer to the coroner as "Dr. Wyatt," he did not identify himself as a doctor. Director's Exhibits 51, 99.

With respect to Dr. Myers's opinion, the administrative law judge rationally determined that it was poorly reasoned and conclusory and, therefore, entitled to little weight on the

ground that the doctor did not identify an adequate basis for his conclusion that black lung disease contributed to the miner's death. Decision and Order at 19; Claimant's Exhibit 1; *see Clark*, *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). Claimant's remaining allegations concerning the reports of Drs. Caffrey and Naeye are also without merit. Contrary to claimant's suggestion, these opinions are not sufficient to establish that pneumoconiosis caused or hastened the miner's death. Both Drs. Caffrey and Naeye stated explicitly that pneumoconiosis played no role in the miner's demise. Director's Exhibits 103, 104; *see Brown*, *supra*; *Neeley*, *supra*; *Trumbo*, *supra*. Thus, we affirm the administrative law judge's determination that claimant has not established that the miner's death was caused by pneumoconiosis pursuant to Section 718.205(c)(1) or (c)(2), as claimant has not raised any meritorious allegations of error.[3] The denial of benefits with respect to the survivor's claim is, therefore, affirmed.

Concerning the findings relevant to the miner's claim under Section 718.202(a), claimant argues that, pursuant to Section 718.202(a)(1), the administrative law judge erred in relying upon the numerical superiority of the negative x-ray readings in contravention of the holding of the United States Court of Appeals for the Sixth Circuit in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). We reject claimant's argument. Although the administrative law judge stated that it was within his discretion to defer to the numerical superiority of the x-ray readings, Decision and Order at 10, he based his ultimate finding upon his determination that the majority of interpretations offered by physicians who are both B readers and Board-certified radiologists is negative for pneumoconiosis. *Id.*. Thus, the administrative law judge's finding was properly based upon both a qualitative and quantitative analysis of the x-ray evidence and is not, therefore, in conflict with the Sixth Circuit's decision in *Woodward*. *See Woodward*, *supra*; *see also Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985). We affirm, therefore, the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant also asserts that in considering the evidence regarding the existence of pneumoconiosis under Section 718.202(a), the administrative law judge should have applied the true doubt rule and should have found that the physicians who submitted reports on behalf of employer were biased. These contentions are without merit. The administrative law judge did not err in declining to apply the true doubt rule in the present case, as the United States Supreme Court invalidated the rule in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2-1A (1994), holding that a claimant must establish each element of entitlement by a preponderance of the evidence. In addition, claimant's unsupported allegation regarding the bias of the physicians who submitted opinions on behalf of employer does not constitute a proper ground for the discrediting of this evidence. An administrative law judge cannot reject evidence prepared by a physician on the ground that

[3]The irrebuttable presumption of death due to pneumoconiosis is not available in this case, as there is no evidence in the record indicating that the miner suffered from complicated pneumoconiosis. *See* 20 C.F.R. §§718.205(c)(3), 718.304.

he or she provided the evidence on behalf of a particular party without specific proof that the opinion offered has been affected by bias. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984).

Finally, claimant maintains that the doctors upon whom claimant relies have qualifications equal to those possessed by the other physicians in this case. We hold that claimant has identified a meritorious allegation of error that applies to the administrative law judge's finding under Section 718.202(a)(2). The administrative law judge based his determination that the biopsy evidence of record did not demonstrate the existence of pneumoconiosis under Section 718.202(a)(2), in part, upon the fact that Drs. Caffrey and Hutchins, physicians who determined that the miner's lung tissue did not show evidence of pneumoconiosis, were more highly qualified than Dr. Naeye, who diagnosed simple pneumoconiosis.[4] The administrative law judge erred in stating that Drs. Caffrey and Hutchins are better qualified than Dr. Naeye, inasmuch as Dr. Naeye, like Dr. Caffrey, is Board-certified in Anatomic and Clinical Pathology, while Dr. Hutchins is Board-certified in Anatomic Pathology. Employer's Exhibit 3.

In addition, the administrative law judge should have considered Dr. Caffrey's opinion solely under Section 718.202(a)(4), inasmuch as the doctor reviewed medical evidence in addition to the lung biopsy and included his analysis of the lung tissue in the course of his medical opinion concerning the significance of the medical evidence of record as a whole. Director's Exhibit 47. Thus, we vacate the administrative law judge's finding under Section 718.202(a)(2) and remand this case to the administrative law judge for reconsideration of the conflicting biopsy reports of Drs. Hutchins and Naeye. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). If the administrative law judge determines that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(2) on remand, he must then consider whether claimant has established the remaining elements of entitlement with respect to the miner's claim pursuant to Sections 718.203(b), 718.204(b), and 718.204(c).

[4]The administrative law judge acted within his discretion in giving little weight to the reports in which Dr. Eisenhart stated that the tissue samples were consistent with the federal guidelines for diagnosing black lung disease on the ground that the doctor did not explain the shift from his earlier opinion that the findings upon microscopic examination of the tissue samples were not, in and of themselves, diagnostic of the disease. Decision and Order at 11; Director's Exhibits 10, 61; Claimant's Exhibit 2; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge