BRB No. 02-0426 BLA

MARION STACEY (Widow of EUGENE STACEY)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld, Schiller & Holmes), Pittsburgh, Pennsylvania, for claimant.

Ashley M. Harman (Jackson and Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-00131 and 2001-BLA-00132) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on a living miner's 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] Based on the date

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

of filing,[2] the administrative law judge adjudicated the claims pursuant to 20 C.F.R Part 718,

---

[2]The record indicates that the miner, Eugene Stacey, filed an application for benefits on August 25, 1997. Director's Exhibit 1. This claim was denied by the district director on December 24, 1997, due to the miner's failure to establish the existence of coal workers' pneumoconiosis, or that he was totally disabled due to pneumoconiosis, although the miner was able to establish the presence of a totally disabling respiratory impairment. Director's Exhibit 17. The miner submitted new evidence on December 8, 1998, and the district director treated this submission of evidence as a request for modification which was denied on December 30, 1998, again due to the miner's failure to establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 23. On January 22, 1999, the miner requested a formal hearing, and thereafter died on September 30, 1999. Director's Exhibits 24, 33. Claimant, Marion Stacey, the miner's widow, filed her application for survivor's benefits on March 3, 2000, which was denied by the district director on August 4, 2000, due to claimant's failure to establish any required element of entitlement. Director's Exhibits 39, 42. The living miner's claim was associated with the survivor's claim, and was again denied by the district director on August 7, 2000. Director's Exhibit 43. Claimant thereupon requested a formal hearing. Director's Exhibit

and noted the parties' stipulation that claimant established at least twenty-one years of coal mine employment and suffered from a totally disabling respiratory impairment. Hearing Transcript at 26-27. On the merits, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (2000), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge found that claimant had not demonstrated a change in condition or a mistake of fact pursuant to 20 C.F.R. §725.310, in the miner's claim, or entitlement to benefits in the survivor's claim. Consequently, benefits were denied in both claims.

44.

On appeal, claimant challenges the findings of the administrative law judge that the evidence is insufficient to establish the presence of coal workers' pneumoconiosis, total disability due to pneumoconiosis, and that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In order to establish entitlement to benefits in a survivor's claim filed 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 or factor leading to the miner's death.[4] *See* 20 C.F.R. §§718.201, 718.202(a), 718.203, 718.205(c); *Trumbo v. Reading*

[3]We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(3), and 718.204(b), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Since the miner's last coal mine employment took place in the State of West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Director's Exhibit 2.

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). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993).

Claimant argues that the autopsy report of Dr. Smith establishes the presence of pneumoconiosis pursuant to Section 718.202(a)(2) since this physician considered the autopsy findings consistent with those patterns found in soft coal miners who go on to develop severe chronic obstructive pulmonary disease. We disagree. The administrative law judge found that the existence of pneumoconiosis was not established by Dr. Smith's report since as autopsy prosector, he stated that "the classic patterns of anthracosilicosis with massive fibrosis are not identified" and he did not perform a microscopic examination of the miner's lung tissue, which violates the regulatory standards regarding autopsy evidence, and severely limited his ability to reach a diagnosis. Director's Exhibit 37; Decision and Order at 13-14; Employer's Exhibit 1; 20 C.F.R. §718.106(a); *Urgolites v. Bethenergy Mines, Incorporated,* 17 BLR 1-20 (1992); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Kerstetter v. Director, OWCP,* 9 BLR 1-42 (1986). The administrative law judge rationally accorded determinative weight to the opinions of Drs. Bush and Tomashefski, which stated that they did not find evidence of coal workers' pneumoconiosis, due to their status as Board-certified pathologists, and their microscopic review of the miner's autopsy slides. Decision and Order at 13-14; Employer's Exhibit 3; Director's Exhibits 37, 41; *Urgolites, supra; Dillon, supra; Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987). As the administrative law judge reasonably determined that none of the autopsy reports of record diagnosed the presence of pneumoconiosis, he rationally determined that claimant could not establish this required element at Section 718.202(a)(2). *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994).

With respect to the administrative law judge's weighing of the medical evidence regarding the existence of pneumoconiosis, claimant argues that the administrative law judge erred by failing to find that x-ray notes, contained in an October 14, 1997 x-ray report indicating that the markings in the miner's lungs are "consistent with chronic obstructive pulmonary disease," are sufficient to satisfy the regulatory definition of pneumoconiosis pursuant to Section 718.201. Director's Exhibit 15. We disagree. Positive x-ray readings must be properly classified in order to establish pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.102; *McMath v. Director, OWCP,* 12 BLR 1-6 (1988). Further, the statutory definition of pneumoconiosis at Section 718.201 includes a diagnosis of chronic obstructive pulmonary disease arising out of coal mine employment, which is not indicated in the notes highlighted by claimant.

Claimant also contends that the administrative law judge erred in finding the medical reports of Drs. Shareef and Cummin, which diagnosed chronic obstructive pulmonary disease due to smoking and coal dust exposure, insufficient to establish the existence of pneumoconiosis. Contrary to claimant's contention, the administrative law judge did not reject Dr. Shareef's opinion. The administrative law judge considered Dr. Shareef's opinion

well-documented and acknowledged his Board-certified status. The administrative law judge however, acted within his discretion to determine that the contrary medical opinions of record, which were based on a broader review of the medical evidence, in addition to the uniformly negative x-ray interpretations, were "more persuasive than Dr. Shareef's" opinion. Decision and Order at 14-15; Director's Exhibit 13; *Dillon, supra; Snorton v. Zeigler Coal Co.,* 9 BLR 1-106 (1986); *Stanford v. Valley Camp Coal Co.,* 7 BLR 1-906 (1985).

The administrative law judge accorded less weight to Dr. Cummin's opinion for several reasons. The administrative law judge found that Dr. Cummin treated the miner for only a short time, and "the extent of his treatment was limited to maintaining him on drugs prescribed by another physician." Decision and Order at 14; Director's Exhibits 33, 46. The administrative law judge rationally gave less weight to this opinion since Dr. Cummin acknowledged that he had little expertise in treating pneumoconiosis, and that he based his diagnosis on Dr. Shareef's report.[5] Decision and Order at 15; Director's Exhibits 33, 46; *see Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994); *Dillon, supra; Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Hutchens v Director, OWCP,* 8 BLR 1-16 (1985); *Revnak v. Director, OWCP,* 7 BLR 1-771 (1985). As the record supports the administrative law judge's interpretation of Dr. Cummin's opinion, we reject claimant's contention that the administrative law judge mischaracterized the opinion of this physician, and hold that substantial evidence supports the administrative law judge's findings on this issue.

It was also within the administrative law judge's discretion to accord greater weight to the contrary opinions of Drs. Grodner and Fino, both Board-certified pulmonologists, and Drs. Bush and Tomashefski, who are Board-certified pathologists, as well documented, reasoned and persuasive, and based on their superior qualifications. Decision and Order at 14-15; Employer's Exhibits 2, 3, 5; Director's Exhibits 37, 41; *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*); *Dillon, supra; Martinez, supra; Lucostic v. U.S. Steel Corp.,* 8 BLR 1-46 (1985).

Furthermore, we reject claimant's suggestion that the administrative law judge applied an inaccurate definition of pneumoconiosis, or that these opinions support her burden of proof, since these physicians clearly indicated that they did not find evidence of the existence of coal workers' pneumoconiosis. *Fuller, supra.* Accordingly, we affirm the administrative law judge's finding that the medical opinions of record, when considered with the other evidence relevant to Section 718.202(a), do not support a finding of pneumoconiosis, or a change in conditions or a mistake of fact pursuant to Section

[5]Dr. Cummin acknowledged during his deposition testimony that the miner's diagnosis of pneumoconiosis was made by Dr. Shareef. Dr. Cummin further stated that he is "not qualified to diagnose [the miner] with [pneumoconiosis]." Dr. Cummin Deposition at 14. Dr. Cummin concluded that the miner had chronic obstructive pulmonary disease secondary to his coal dust exposure, based on a twenty year history of coal mine work and Dr. Shareef's opinion as a pulmonary specialist. Dr. Cummin Deposition at 22.

725.310. Decision and Order at 15; *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Jessee v. Director, OWCP,* 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kovak v. BCNR Mining Corp.,* 14 BLR 1-156 (1990).

As we have affirmed the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement in both the living miner's claim and the survivor's claim, we must also affirm the denial of benefits, and we decline to address claimant's remaining arguments. *See Shuff, supra; Trent, supra; Perry, supra.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge