BRB No. 04-0725 BLA

ROSE FIELDS (Widow of THORNE FIELDS) Claimant-Petitioner v. MOUNTAIN COALS CORPORATION and WEST VIRGINIA INDEPENDENT COAL HOLDING Employer/Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/25/2005 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (03-BLA-5255) of Administrative Law Judge Rudolf L. Jansen 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).[1] In accordance with the parties' stipulation, the administrative law judge credited claimant with fourteen years of coal mine employment. On the merits, the administrative law judge found that claimant failed to establish, by a preponderance of the evidence, that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1), (a)(4), and argues that the administrative law judge considered x-ray evidence submitted by employer in excess of the limits set forth in 20 C.F.R. §725.414(a)(3)(i). In response, employer urges affirmance of the administrative law judge's denial of benefits. Regarding Section 725.414(a)(3)(i), employer acknowledges that it offered evidence beyond that which is permitted by the regulations, but after the administrative law judge sustained claimant's objection at the hearing, it submitted a revised list of designated evidence on November 21, 2003, in conformance with the requirements of Section 725.414(a)(3)(i). The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response, agreeing that the administrative law judge erred in admitting one extra x-ray interpretation, but asserting that this violation of Section 725.414 is harmless, in view of the administrative law judge's weighing of the admissible evidence.[2]

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

[1]Claimant is the widow of the miner, Thorne Fields, who died on November 4, 2000. Director's Exhibit 1, 7. On June 15, 2001, claimant filed a survivor's claim. Director's Exhibit 1.

[2] Because the parties do not challenge the administrative law judge's decision to credit the miner with fourteen years of coal mine employment or his findings pursuant to 20 C.F.R. §718.202(a)(2), (3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

may not be disturbed. 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).

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 the death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(a)(1)-(3); *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 was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Brown v. Rock Creek Mining Co., Inc.*, 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).

We will first address the issue of whether claimant established the existence of pneumoconiosis under Section 718.202(a)(1). In support of her affirmative case, claimant offered Dr. Barrett's positive interpretations of x-rays obtained on September 12, 2000 and October 13, 2000. Director's Exhibit 10. Employer acknowledged at the hearing that it had submitted evidence in excess of the limitations set forth in Section 725.414(a)(3). Hearing Transcript at 7. The administrative law judge accepted this evidence into the record, but instructed employer to provide a list identifying its affirmative and rebuttal evidence and indicated that he would exclude evidence that did not comply with Section 725.414(a)(3). *Id*. at 9. Employer subsequently proffered a document in which it identified the negative readings by Drs. Kendall and Halbert of x-rays dated January 22, 2000, March 15, 2000, April 4, 2000, September 12, 2000, and October 13, 2000, as the x-ray interpretations upon which it would rely.[3] Director's Exhibit 27; Employer's Exhibits 6, 9, 10.

The administrative law judge considered these readings in addition to six interpretations included in medical records documenting claimant's treatment by Drs. Chaney, Nachbauer, and Ghazal and his hospitalizations. Director's Exhibit 9. The administrative law judge accurately determined that of these thirteen interpretations, five were negative for pneumoconiosis, two were positive for pneumoconiosis and six were not read for pneumoconiosis. Decision and Order - Denying Benefits at 12. The

[3] Employer indicated that all five of these readings constituted "rebuttal evidence." Employer's Exhibit 23 dated November 26, 2003.

administrative law judge then found that because the x-ray evidence was in equipoise, claimant did not satisfy her burden of proof pursuant to Section 718.202(a)(1). *Id*.

Claimant contends that the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis must be vacated, as the administrative law judge erred in failing to strike x-ray interpretations submitted by employer in violation of Section 725.414(a)(3). Claimant also argues that the administrative law judge improperly relied solely upon the "qualifications of the physicians" and the "numerical superiority of x-ray interpretations" and "may have selectively analyzed" the evidence. Claimant's Brief at 3.

Claimant is correct in maintaining that the administrative law judge admitted and considered excess x-ray evidence. Contrary to employer's assertion, Dr. Kendall's negative reading of a film dated January 22, 2000 is not rebuttal evidence because it does not address an x-ray interpretation offered by claimant in her affirmative case. Employer's Brief at 4-5; Employer's Exhibit 6; 20 C.F.R. §725.414(a)(3)(ii). In addition, if Dr. Kendall's reading of this x-ray is treated as supporting employer's affirmative case, employer has exceeded the limit of two interpretations set forth in Section 725.414(a)(3)(i), as the record contains a total of three readings by Dr. Kendall, none of which addresses a reading proffered by claimant. Employer's Exhibits 7, 8; 20 C.F.R. §724.414(a)(3)(i).

This error does not require remand, however. The administrative law judge fully considered the x-ray readings and the qualifications of the readers and acted within his discretion in finding that the evidence was in equipoise, as equally qualified physicians were divided as to whether the miner's chest x-rays were positive for pneumoconiosis. Decision and Order – Denying Benefits at 12; *Stanton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). The exclusion of an additional negative x-ray reading would result in the record containing four negative readings and two positive readings and would not alter the administrative law judge's rational determination. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We also reject claimant's general contention that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 4. Claimant has not provided any support for her assertion, nor does a review of the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *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). We affirm, therefore, the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in rejecting the opinion of Dr. Chaney, that the miner had pneumoconiosis and that it hastened the miner's death, and that the administrative law judge failed to considered the doctor's status as the miner's treating physician. Claimant's contentions lack merit. The administrative law judge acknowledged that Dr. Chaney had treated claimant since 1994 but rationally assigned his opinion less weight because Dr. Chaney did not identify the x-ray upon which he relied in diagnosing pneumoconiosis and made vague and inconsistent statements regarding the cause of the miner's chronic obstructive pulmonary disease (COPD). *Peabody Coal Co. v. Groves*, 227 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order - Denying Benefits at 14; Director's Exhibit 12 at 7, 12; Employer 11. The administrative law judge correctly found that when deposed, Dr. Chaney first stated that it was "most likely" that smoking was the cause of the miner's COPD rather than coal dust exposure, but later in the deposition opined that the miner's COPD was caused "at least in part by coal dust." *Id.* Contrary to claimant's contention, the administrative law judge was not required to accord enhanced weight to the opinion of Dr. Chaney based on his status as treating physician, as the administrative law judge properly found that the doctor's opinion was inconsistent, vague and unpersuasive. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Griffith v. Director,* OWCP, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark*, 12 BLR 1-149. Thus, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established under Section 718.202(a)(4).[4]

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Ondecko,* 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26, 1-27. The administrative law judge is empowered to weigh the medical evidence and to 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. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*, 12

[4] Regarding the administrative law judge's weighing of the evidence relevant to 20 C.F.R. §718.202(a)(4), the Director states that because Dr. Nachbauer did not address any of claimant's objective medical evidence, the administrative law judge erred in admitting Dr. Nachbauer's opinion as rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii). As the Director has indicated, however, error, if any, in the administrative law judge's treatment of this report is harmless because the administrative law judge did not credit Dr. Nachbauer's opinion when considering the evidence pursuant to Section 718.202(a)(4). Decision and Order – Denying Benefits at 15; Director's Exhibit 26; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

BLR 1-20 (1988). In this case, claimant is doing no more than requesting that we reweigh the evidence, which we cannot do. *Anderson,* 12 BLR at 1-113. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis, an essential element of entitlement, as it is supported by substantial evidence and is in accordance with law. *See Trent,* 11 BLR 1-26; *Perry,* 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge