BRB No. 08-0437 BLA

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| J.M.<br>(Widow of W.M.)<br><br>Claimant-Petitioner<br><br>v.<br><br>MARTIN COUNTY COAL CORPORATION<br><br>and<br><br>A.T. MASSEY<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 03/17/2009<br><br>DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

Claimant[1] appeals the Decision and Order Denying Benefits (2004-BLA-06668) of Administrative Law Judge Jeffrey Tureck 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 approximately sixteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and accordingly, denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant also argues that the administrative law judge erred in failing to find that pneumoconiosis substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant is the widow of the miner, who died on April 5, 2003. The miner filed two claims for black lung benefits during his lifetime. The miner's initial claim, filed on February 2, 1988, was finally denied on December 20, 1991. Director's Exhibit 1. The miner's second claim, filed on February 3, 2000, was denied on September 30, 2002. *Id*. No further action was taken on the miner's second claim and it is not before the Board in this appeal. Claimant filed this survivor's claim on April 15, 2003.

[2] We affirm, as they are unchallenged by the parties on appeal, the administrative law judge's findings regarding the length of the miner's coal mine employment and that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *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).

After considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Regarding 20 C.F.R. §718.202(a)(1), claimant asserts that the x-ray readings by Drs. Baker and Vuskovich establish the existence of pneumoconiosis. Claimant's Brief at 25. The administrative law judge considered the positive interpretation by Dr. Vuskovich, whose qualifications are not in the record, of an x-ray dated November 1, 2001, and the positive interpretations by Dr. Baker, a B reader, of two x-rays dated April 4, 2000 and March 22, 2001.[4] Decision and Order at 4; Claimant's Exhibits 1, 2, 6. The administrative law judge also considered the negative interpretation by Dr. Broudy, a B-reader, of the November 1, 2001 x-ray, and the negative interpretations of Dr. Wiot, a Board-certified radiologist and B reader, of the x-rays dated February 3, 2001, March 22, 2001, May 2, 2001, and April 4, 2003. Employer's Exhibits 1, 7, 8, 15.

[4] The administrative law judge also considered the x-ray interpretations from the miner's hospitalizations, none of which contained a diagnosis of pneumoconiosis or utilized the ILO-U/C classification system. Decision and Order at 3-4. The administrative law judge also noted that Dr. Thorarinsson's interpretation of a May 2, 2001 x-ray as showing severe chronic obstructive pulmonary disease and pulmonary fibrosis compatible with pneumoconiosis did not utilize the ILO-U/C classification system.

The administrative law judge permissibly accorded greatest weight to Dr. Wiot's x-ray readings in light of his superior radiological qualifications[5] and rationally found that the preponderance of the x-ray evidence was negative for pneumoconiosis. *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*); Decision and Order at 4. Contrary to claimant's assertions, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the negative readings by Dr. Wiot, the most qualified reader, outweighed the positive x-ray readings by Drs. Baker and Vuskovich. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 4. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in his determination regarding the length of the miner's smoking history, and thus erred in failing to find that legal pneumoconiosis was established by the medical opinion evidence under 20 C.F.R. §718.202(a)(4). Claimant specifically contends that the administrative law judge's finding of a forty-year smoking history is incorrect and argues that the miner "only smoked approximately for a five year period." Claimant's Brief at 2. Claimant maintains that her hearing testimony, as well as the testimony of two witnesses at the hearing, was more accurate than the miner's own statements provided to his treating physicians during his hospitalizations because when he "was admitted to the hospital[,] he was confused as to the forty-year history of smoking" and "was not coherent enough to provide correct information." *Id*.

In considering the length of claimant's smoking history, the administrative law judge acknowledged that the testimony of the miner during the hearings conducted in conjunction with his prior claim,[6] as well as the testimony of claimant and two witnesses

[5] The administrative law judge noted that, in addition to his qualifications as a Board-certified radiologist and B reader, Dr. Wiot was a Professor of Radiology at the University of Cincinnati for thirty-two years, was a member of the American College of Radiology Task Force on Pneumoconiosis which created the ILO-U/C standards used to interpret x-rays for pneumoconiosis, and remains on that task force; and has been part of numerous national and international committees in regard to these standards. Decision and Order at 4.

[6] The administrative law judge stated that the miner testified at "depositions" in 1991 and 2001, Decision and Order at 2, but a review of the record indicates that the administrative law judge was actually discussing the miner's testimony at the hearings

at the November 15, 2006 hearing, reflected that the miner "smoked for no more than five to six years at a rate of about a half pack a day." Decision and Order at 2; Claimant's Exhibit 3; *see* Hearing Transcript at 18, 26-29. The administrative law judge, however, found that the testimony of the miner, claimant, and hearing witnesses was contradicted by hospitalization records and the medical reports of Drs. Thorarinsson and Baker, indicating that the miner had a forty-year history of smoking and/or exposure to tobacco smoke. Decision and Order at 2-3; Director's Exhibits 9, 10; Claimant's Exhibit 4; Employer's Exhibit 3. The administrative law judge determined that the opinions of Drs. Thorarinsson and Baker were the most credible evidence on this issue[7] and consequently found "that the miner smoked cigarettes at a rate of a pack a day for at least [forty] years." Decision and Order at 3. Although claimant challenges this determination, the administrative law judge, as the trier of fact, has exclusive power to make determinations as to the weight and credibility of the evidence, *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002), and the Board will not substitute its inferences for those of the administrative law judge. Consequently, we hold that the administrative law judge permissibly relied on the medical experts in determining the length and extent of miner's smoking history and we affirm those finding as supported by substantial evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 3.

Claimant further contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), because he did not accord "more weight" to Dr. Thorarinsson's

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held on June 6, 1991, and December 11, 2001, in his prior claims. *See* December 11, 2001 Hearing Transcript at 26-27; June 6, 1991 Hearing Transcript at 30-32.

[7] The administrative law judge was persuaded that "the miner would have been expected to provide an accurate smoking history to the doctor who was treating him for his severe lung disease" and, therefore, credited Dr. Thorarinsson's March 1, 2001 report, indicating that the miner had a forty-year smoking history. Decision and Order at 3. The administrative law judge further found Dr. Baker's opinion to be credible. Dr. Baker discussed the inconsistent smoking histories and opined that given the degree of the miner's obstructive impairment, he probably smoked closer to forty years. Decision and Order at 3; Claimant's Exhibit 4. Thus, the administrative law judge noted: "two doctors [Drs. Baker and Thorarinsson] who would be expected to be supportive of claimant's case agree that the miner had emphysema due to cigarette smoke, and both believe that a five pack year exposure would not have caused the degree of impairment the miner had." *Id*.

diagnosis, "as evidence of legal coal workers' pneumoconiosis," in light of his status as one of the miner's "treating physicians" pursuant to 20 C.F.R. §718.104(d).[8] Claimant's Brief at 1, 25. Claimant's argument lacks merit.

The administrative law judge recognized that Dr. Thorarinsson was the miner's treating physician and that he diagnosed pneumoconiosis and chronic obstructive pulmonary disease, but concluded that there was "no apparent basis for his diagnosis of pneumonconiosis." Decision and Order at 5. The administrative law judge determined that Dr. Thorarinsson's opinion was not "arrived at independently," but based on "a historical diagnosis of pneumoconiosis which he was aware of when he first started treating [the miner]." *Id.* The administrative law judge further found that "[s]ince Dr. Thorarinsson believed the miner's emphysema was due solely to cigarette smoke, . . . his opinion that the miner had pneumoconiosis, which relies so heavily on his own erroneous x-ray interpretations, is not probative." *Id.* The administrative law judge permissibly determined that Dr. Thorarinsson's opinion was not entitled to any weight because it was without sufficient objective documentation to support his conclusion. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983); Decision and Order at 5; Director's Exhibit 9; Employer's Exhibit 3.

In addition, contrary to claimant's argument, an administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *see also* 20 C.F.R. §718.104(d); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Trumbo*, 17 BLR at 1-88-89. We therefore affirm the administrative law judge's decision to accord Dr. Thorarinsson's opinion less weight.

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[8] The regulation at 20 C.F.R. §718.104(d)(5) provides, in pertinent part:

> In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

20 C.F.R. §718.104(d)(5).

Furthermore, because claimant does not otherwise challenge the weight accorded the remaining medical opinions as to the existence of pneumoconiosis, and she does not identify any substantive error of law or fact in the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), we affirm his credibility determinations thereunder. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107(1983). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis.

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 of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded.[9] *See* 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

[9] Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, it is not necessary to address her argument as to whether pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c)(2). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge