BRB No. 08-0587 BLA

E. C. (Widow of M. C.) Claimant-Petitioner v. GOLDEN OAK MINING COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/30/2009 DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

E. C., Bonnyman, Kentucky, *pro se.*

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order-Denying Benefits (05-BLA-6103) of Administrative Law Judge William S. Colwell 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 seventeen years of coal mine

[1] Claimant is the widow of the miner, who died on January 24, 1997. Director's Exhibit 11. Claimant filed her claim for survivor's benefits on July 9, 2004. Director's Exhibit 2.

employment[2] pursuant to parties' stipulation. Decision and Order at 12. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 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). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer did not participate in this appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). 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, and is in accordance with 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).

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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, 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),(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*., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eleven readings of seven x-rays, and considered the readers' radiological credentials. Initially, the administrative law judge reasonably discounted five readings of x-rays that

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 6, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

were contained in the miner's medical treatment records, as those readings, which did not mention pneumoconiosis, were not conducted for the purpose of diagnosing pneumoconiosis.[3] *See Sacolick v. Rushton Mining Co.*, 6 BLR 1-930 (1984).

In considering the remaining x-ray readings, the administrative law judge permissibly determined to accord greater weight to the readings by physicians who were "dually-qualified" as both Board-certified radiologists and B readers.[4] *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order at 15-16. The administrative law judge accurately noted that Dr. Marshall, a Board-certified radiologist and B reader, read the July 29, 1986 x-ray as positive for pneumoconiosis, while Dr. Sargent, a physician with the same dual qualifications, read the x-ray as negative for pneumoconiosis. Director's Exhibit 16-4; Employer's Exhibit 1. Further, the administrative law judge noted that Dr. Hashem, a Board-certified radiologist and B reader, read the October 10, 1986 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a physician with the same qualifications, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 16-36; Employer's Exhibit 2. Based on these conflicting readings by equally-qualified physicians, the administrative law judge reasonably found that the July 29, 1986 and October 10, 1986 x-rays were "in equipoise" for the presence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 16. The administrative law judge, therefore, permissibly found that the x-ray evidence did not establish the existence of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. We affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(2),(3), the administrative law judge accurately determined that the record contains no autopsy or biopsy evidence, no evidence of complicated pneumoconiosis, and that this survivor's claim was filed after June 30, 1982. Decision and Order at 16. We therefore affirm the administrative law judge's finding

[3] As the administrative law judge found, the December 10, 1987 and January 1, 1990 x-rays, read by Dr. Polisetty, the January 11, 1987 and January 15, 1990 x-rays, read by Dr. Patel, and the January 18, 1990 x-ray, read by Dr. Pampati, were taken and read while the miner was being treated for pneumonia at Appalachian Regional Hospital. Director's Exhibit 16 at 16, 18, 19, 63, 64.

[4] The administrative law judge therefore accorded less weight to the negative readings by Dr. Fino, a B reader, of the December 11, 1987 and January 12, 1990 x-rays. Employer's Exhibits 3, 4.

that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Dr. Wicker, the miner's treating physician, and Dr. Pellegrini opined that the miner suffered from pneumoconiosis, while Drs. Castle and Broudy opined that the miner did not have either clinical or legal pneumoconiosis.[5] Director's Exhibits 16-34, 17, 18, 34; Claimant's Exhibit 1.

The administrative law judge initially noted, accurately, that the record lacked evidence of the nature and extent of the treatment relationship between the miner and Dr. Wicker. *See* 20 C.F.R. §718.104(d). Further, the administrative law judge permissibly found that Dr. Wicker's March 28, 2005 opinion, that the miner's "chart" indicated that "his underlying pneumoconiosis contributed to his fibrosis," was not well-reasoned or documented, because Dr. Wicker failed to explain his reasoning or provide objective documentation to support his conclusion that the miner had pneumoconiosis. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Director's Exhibit 18 at 2. Further, the administrative law judge reasonably found Dr. Wicker's 2005 opinion to be less credible, noting that in 1997, at the time of the miner's death, Dr. Wicker had not mentioned pneumoconiosis in either the discharge summary of the miner's final hospitalization or on the miner's death certificate. *See Williams*, 338 F.3d at 514, 22 BLR at 2-649; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

With respect to Dr. Pellegrini, the administrative law judge considered Dr. Pellegrini's 1986 report, developed in the miner's unsuccessful claim for benefits, and Dr. Pellegrini's 2006 report, that claimant submitted in the survivor's claim as a supplement to the doctor's 1986 report.[6] Dr. Pellegrini opined that the miner suffered

[5] A finding of either clinical or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic disease or impairment of the lung and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[6] The miner filed a claim in 1984 that was finally denied on November 29, 1990. Director's Exhibit 1. In the survivor's claim, the parties designated certain items of evidence from the miner's claim as evidence in the survivor's claim. Thus, claimant designated Dr. Pellegrini's 1986 and 2006 reports, considered together, as one of her two affirmative medical reports. *See* 20 C.F.R. §725.414(a)(2)(i).

from both clinical and legal pneumoconiosis, citing a positive chest x-ray and the miner's pulmonary function and blood gas study results. Director's Exhibit 16-34; Claimant's Exhibit 1. The administrative law judge permissibly found that, to the extent Dr. Pellegrini relied on a positive chest x-ray to diagnose clinical pneumoconiosis, the doctor's diagnosis was "less credible" in view of the administrative law judge's finding that the readings by Board-certified radiologists and B readers were "at best equivocal for the presence of pneumoconiosis." Decision and Order at 20; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, the administrative law judge permissibly accorded "less weight" to Dr. Pellegrini's opinion because there was no indication that Dr. Pellegrini was aware of the extent of the miner's "lengthy and heavy smoking history,"[7] and because Dr. Pellegrini did not adequately explain why he concluded that the results of the miner's objective studies were consistent with a diagnosis of legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Finally, the administrative law judge permissibly found that, although medical treatment notes dating from the late 1980's and early 1990's listed diagnoses of pneumoconiosis by a Dr. Williams, those records merited "less weight" because the bases for the diagnoses were generally unspecified. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 18 n.10. Further, the administrative law judge reasonably found that, to the extent that a December 9, 1987 diagnosis of pneumoconiosis by Dr. Williams appeared to be based on a chest x-ray, the diagnosis was not credible because the x-ray evidence of record was at best equivocal for the presence of pneumoconiosis. *Id*.

Substantial evidence supports the administrative law judge's permissible credibility determinations. Therefore, we affirm the administrative law judge's finding that claimant did not carry her burden to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8]

[7] Based on claimant's uncontradicted testimony and her answers to interrogatories stating that the miner smoked one and one-half to two packs of cigarettes per day for thirty years, the administrative law judge found that the miner had a "lengthy and heavy smoking history of 45 to 60 pack years." Decision and Order at 17. Substantial evidence supports this finding. Hearing Tr. at 19, 21-22; Director's Exhibit 24 at 14. It is therefore affirmed.

[8] Consequently, we need not address the administrative law judge's finding that the opinions of Drs. Castle and Broudy, that the miner did not have pneumoconiosis, were flawed. Decision and Order at 20-22.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge