BRB No. 01-0662 BLA

SYLVIA J. TARR (Widow of EDWARD G. TARR)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
CLINCHFIELD 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-Denying Benefits Upon Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, Abingdon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits Upon Remand (1998-BLA-0823 and 1998-BLA-0824) of Administrative Law Judge Ainsworth H. Brown on miner's and survivor's claims[1] filed pursuant to the provisions of Title IV of the Federal Coal

[1]The miner, Edward G. Tarr, filed for black lung benefits on April 2, 1996. Director's Exhibit 1. After the miner's death, his widow, Sylvia J. Tarr, filed her claim for survivor's benefits on July 25, 1997. Director's Exhibit 86. Administrative Law Judge Lawrence P.

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This is the second time this case has been before the Board. The Board previously affirmed the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(c)(2000), but vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.204(b), 718.205(c)(2000), and remanded the case for further consideration of the evidence. *Tarr v. Clinchfield Coal Co.*, BRB No. 99-1072 BLA (Sept. 15, 2000)(unpublished). On remand, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, the administrative law judge denied benefits in both the miner's and the survivor's claim. On appeal, claimant challenges the administrative law judge's findings at Section 718.202(a)(1), (2) and (4). In response, employer argues that the administrative law judge's Decision and Order-Denying Benefits Upon Remand is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief on the merits of this appeal.[3]

Donnelly in a Decision and Order issued on June 14, 1999 awarded benefits in both the miner's and the survivor's claims. When the Board remanded the case for further consideration, Judge Donnelly was no longer available, consequently the case was assigned to Administrative Law Judge Ainsworth H. Brown.

[2]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, 722, 725 and 726. All the citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. 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, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis or that the miner had complicated pneumoconiosis.[4] *See* 20 C.F.R. §§718.1, 718.202(a), 718.203, 718.205(c), 718.304; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *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). 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); *see also Shuff, supra*.

[4]Since the miner's last coal mine employment took place in 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*).

Claimant contends that the administrative law judge's finding that pneumoconiosis was not established is not supported by substantial evidence. Claimant specifically states that Drs. Castle, Scott, Wheeler and Fino were "required under the ILO system to note linear opacities present as either s, t, or u opacition" and that by failing to do so, these physicians "worked in their opinions on etiology in their B-reader re-readings." Claimant's Brief at 1, 2. Claimant's contention has no merit. Drs. Castle, Scott, Wheeler and Fino rendered negative interpretations of the x-rays taken on July 25, 1974, May 14, 1996, October 22, 1996 and June 3, 1997. Director's Exhibits 42, 46, 57, 108. Three readings were completely negative, eight indicated that neither parenchymal nor pleural abnormalities consistent with pneumoconiosis were present and one reading was classified as 0/1, which does not constitute evidence of pneumoconiosis. 20 C.F.R. §718.102(b); *Id*. Contrary to claimant's contention, the regulations do not require that negative readings be classified under 20 C.F.R. §718.102(b). *Cranor v. Peabody Coal* Co., 22 BLR 1-1 (1999)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). Moreover, we affirm as unchallenged on appeal, the administrative law judge's finding that the x-ray evidence fails to establish the existence of pneumoconiosis on the ground that the majority of the interpretations by dually qualified physicians is negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[5] 20 C.F.R. §802.211(b); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1987); Decision and Order-Denying Benefits Upon Remand at 7.

With respect to the autopsy evidence, claimant alleges that the diagnosis of "anthracosis" found in Dr. Buddington's gross and microscopic examination of the miner's lungs is uncontradicted and "must be accepted as a finding of legal pneumoconiosis." Claimant's Brief at 2. Claimant's contention is without merit, as the administrative law judge's treatment of the autopsy evidence is rational and supported by substantial evidence.

[5]A dually qualified physician is a B reader and a Board-certified radiologist. A "B reader" is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51(b)(2); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A "Board-certified" radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. §718.202(a)(1)(ii)(C).

The administrative law judge acknowledged that the legal definition of pneumoconiosis includes anthracosis and that "Dr. Buddington's autopsy report, absent credible pathology reports to the contrary, may establish pneumoconiosis" pursuant to Section 718.202(a)(1).[6] Decision and Order-Denying Benefits Upon Remand at 8. Further, the administrative law judge recognized that Dr. Buddington was the autopsy prosector and correctly stated that it would be error to credit his opinion over the opinions of the reviewing pathologists solely on the basis that Dr. Buddington, as prosector, examined the miner's whole body. *Id*.; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR (4th Cir. 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Adkins*, *supra*. The administrative law judge found that the reviewing pathologists, Drs. Tomashefski, Caffrey, Kleinerman, Crouch and Perper, opined that the autopsy evidence showed interstitial fibrosis with consequent respiratory failure. Decision and Order-Denying Benefits Upon Remand at 9. The administrative law judge further found that the majority of the reviewing pathologists opined that the miner's interstitial fibrosis was idiopathic in nature and, therefore, was unrelated to coal dust exposure. Dr. Perper, however, opined that the diffuse interstitial fibrosis was not idiopathic, but a "variant" of pneumoconiosis. *Id.*

[6]The administrative law judge cited 20 C.F.R. §718.201 in support of his determination. Section 718.201 provides that anthracosis arising out of coal mine employment constitutes pneumoconiosis.

The administrative law judge determined that Dr. Perper based his conclusion upon various articles, all of which were reviewed and discredited by Dr. Kleinerman. *Id.*; Director's Exhibit 106. The administrative law judge further found that while no evidence refuted Dr. Buddington's observations upon gross examination, there is a great disparity between the prosector's observations of anthracosis on microscopic examination and those of the five reviewing pathologists. He also concluded that although Dr. Buddington, the prosector, and all of the reviewing physicians are Board-certified pathologists, Dr. Kleinerman's qualifications are superior.[7] Based upon the foregoing findings and in light of Dr. Kleinerman's superior qualifications, the administrative law judge, within a proper exercise of his discretion, accorded significant probative weight to Dr. Kleinerman's opinion, that the autopsy evidence reveals diffuse nonspecific interstitial pneumonitis and interstitial fibrosis unrelated to coal dust exposure. *Akers, supra*; *Adkins, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *McMath, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We affirm, therefore, the administrative law judge's finding that the preponderance of the autopsy evidence fails to establish that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(2), as it is rational and supported by substantial evidence.[8] Decision and Order-Denying Benefits Upon Remand at 10.

Turning to Section 718.202(a)(4), claimant contends that since Dr. Robinette, as the treating physician, was in the best position to assess the miner's condition, Dr. Forehand was a neutral physician chosen by the Department of Labor and Dr. Perper, a Board-certified pathologist, "upheld" Dr. Buddington's diagnosis, the administrative law judge erred in according their opinions "little to no weight." Claimant's Brief at 2. These contentions are without merit. The administrative law judge stated that, based upon his status as the miner's treating physician, Dr. Robinette's opinion was entitled to great, though not necessarily

[7]The administrative law judge found that Dr. Kleinerman served on the Pneumoconiosis Committee of the College of American Pathologists that developed for the National Institute for Occupational Safety and Health the pathology standards used in diagnosing coal workers' pneumoconiosis; served as a member of the American College of Radiology Task Force on Pneumoconiosis since 1984; is a tenured professor of Pathology at Case Western Reserve University School of Medicine; and that of the pathologists that reviewed the autopsy evidence, only Dr. Kleinerman has published extensively on the subject of diagnosing pneumoconiosis pathologically. Decision and Order-Denying Benefits Upon Remand at 10; Director's Exhibits 41, 44, 64, 67, 74, 91, 102.

[8]We affirm as unchallenged the administrative law judge's finding that the biopsy evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Skrack, supra.*

dispositive, weight as long as his conclusions were both well documented and well reasoned. Decision and Order-Denying Benefits Upon Remand at 11; citing *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

The administrative law judge reasonably found, however, that Dr. Robinette's opinion was not well reasoned because the doctor failed to identify and explain the basis for his diagnosis of pneumoconiosis. Decision and Order-Denying Benefits Upon Remand at 13. The administrative law judge noted correctly that Dr. Robinette stated that the biopsy report supported his diagnosis of pneumoconiosis when, in fact, the biopsy evidence was determined to be negative for the existence of pneumoconiosis. The administrative law judge also acted within his discretion in finding that Dr. Robinette did not explain how the biopsy evidence revealed interstitial pneumonitis "superimposed on presumptive occupational pneumoconiosis." *Id.*; Director's Exhibit 21. Furthermore, the administrative law judge rationally determined that Dr. Robinette's opinion is equivocal and vague because he "label[ed] the miner's condition as 'presumptive coal workers' pneumoconiosis' after he had listed it as 'apparent.'" Decision and Order-Denying Benefits Upon Remand at 13; Director's Exhibits 47, 68; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Moreover, the administrative law judge, within a proper exercise of his discretion, found that Dr. Forehand relied upon a number of articles to support his opinion and that Dr. Perper relied upon a 1993 article from a peer-review journal, which Dr. Forehand also cited. The administrative law judge rationally determined that Drs. Sargent, Kleinerman, Fino, Castle and Tomashefski provided credible reasons for invalidating these articles and for concluding that they "failed to establish that diffuse interstitial fibrosis, in the absence of coal dust or coal dust-lesions, is due to coal dust exposure."[9] Decision and Order-Denying

[9]The physicians indicated that the studies described in the articles were flawed, as the sample size was too small; it was unclear whether the persons suffered from interstitial fibrosis; and the sample was not limited to those who had been exposed solely to coal dust. Director's Exhibit 66. Dr. Fino stated that the actual conclusion of the 1993 article upon which both Drs. Forehand and Perper relied was that there is no correlation between the occurrence of diffuse interstitial fibrosis and the type of underlying disease (*i.e.*, silicosis or mixed dust pneumoconiosis). Director's Exhibit 69.

Benefits Upon Remand at 15; Director's Exhibits 66, 67, 69, 71, 106, 108. Therefore, we affirm the administrative law judge's finding that the opinions of Drs. Robinette, Forehand and Perper, the only medical opinions of record in which pneumoconiosis is diagnosed, "merit little probative value" under Section 718.202(a)(4). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Inasmuch as claimant failed to establish that the miner's interstitial fibrosis was due to his coal dust exposure, the administrative law judge reasonably found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). *See Compton, supra*. Therefore, an award of benefits pursuant to 20 C.F.R. Part 718 is precluded in both the miner's claim and the survivor's claim. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry, supra.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge