BRB No. 97-1433 BLA

ROBERTA L. HOLMES (Widow of HAROLD HOLMES) Claimant-Petitioner v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-1647) of Administrative Law Judge Mollie W. Neal denying benefits on a 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, based on the parties' stipulation, credited the miner with twenty-two years of coal mine employment and adjudicated this survivor's claim

[1]Claimant is the widow of the deceased miner, Harold Holmes, who died on April 20, 1992. Director's Exhibits 1, 13.

pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[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 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).

Initially, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Of the nineteen interpretations of five x-rays of record, thirteen readings are negative for pneumoconiosis, Director's Exhibits 16, 24-30, 32, 33; Employer's Exhibit 2, four readings are positive, Director's Exhibits 32, 33, and two interpretations are unreadable, Director's Exhibit 29; Employer's Exhibit 2. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge stated that she "accept[ed] as accurate the uncontradicted opinions of the physicians, dually qualified as B-readers and [B]oard-certified radiologists, who read the February 1, 1986, February 25, 1989, and June 18, 1990 x-rays as negative." Decision and Order at 10. The administrative law judge also stated that "[t]he weight of the opinions of the equally qualified physicians is that the February 10, 1992 x-ray is negative."[3] *Id*. Thus, we reject claimant's assertion that the

[2]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]Whereas Drs. Bassali and Brandon, who are B-readers and Board-certified

administrative law judge erred by relying solely on the numerical superiority of the negative x-ray readings.

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radiologists, read the February 10, 1992 x-ray as positive for pneumoconiosis, Director's Exhibits 32, 33, Drs. Barrett, Sargent and Wiot, who are also B-readers and Board-certified radiologists, read the same x-ray as negative, Director's Exhibits 27, 28; Employer's Exhibit 2.

Claimant also asserts that the administrative law judge mischaracterized the interpretations of the April 20, 1992 x-ray.[4] The administrative law judge stated that "[t]he April 20, 1992 x-ray...was found to be unreadable by two physicians, and was read as positive and negative by an equal number of physicians."[5] *Id*. Further, the administrative law judge stated that Dr. Branscomb opined "that the April 20, 1992 x-ray was unreadable under the ILO system because of the miner's critical illness due to congestive heart failure." *Id*. However, an examination of the record reveals that while two physicians read the April 20, 1992 x-ray as positive for pneumoconiosis, Dr. Barrett was the only physician of record to read this x-ray as negative, and Dr. Branscomb did not interpret the April 20, 1992 x-ray.[6] Nonetheless, since the administrative law judge properly found that the four prior x-rays, one of which was taken contemporaneously with the April 20, 1992 x-ray, are negative for pneumoconiosis based on the numerical superiority of the negative x-ray readings provided by physicians with superior qualifications, *see Woodward, supra*; *Fitts, supra*; *Martin v. Director, OWCP*, 6 BLR 1-535 (1983), the administrative law judge's mischaracterization of the April 20, 1992 x-ray readings is harmless error, *see Larioni v.*

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[4]Whereas Drs. Brandon and Bassali read the April 20, 1992 x-ray as positive for pneumoconiosis, Director's Exhibits 32, 33, Dr. Barrett read the same x-ray as negative, Director's Exhibit 30. Drs. Sargent and Wiot found the April 20, 1992 x-ray to be unreadable. Director's Exhibit 29; Employer's Exhibit 2. As previously noted, *supra* note 3, each of the five physicians possess similar radiological qualifications.

[5]The administrative law judge stated that "two highly qualified physicians interpreted [the April 20, 1992] chest film as negative." *Id*.

[6]In reviewing several x-ray interpretations, Dr. Branscomb stated that "Dr. Sargent called [the April 20, 1992 x-ray] unreadable - perhaps because under the ILO system all films of critically ill persons are considered to be unreadable." Employer's Exhibit 3.

Director, OWCP, 6 BLR 1-1276 (1984). Therefore, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[7]

[7]Inasmuch as the record does not indicate that Dr. Amundson provided an x-ray interpretation, we reject claimant's assertion that the administrative law judge erred by failing to consider Dr. Amundson's opinion at 20 C.F.R. §718.202(a)(1).

Finally, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. Whereas Dr. Amundson opined that the miner suffered from pneumoconiosis, Director's Exhibits 16, 32, Drs. Branscomb and Hansbarger opined that the miner did not suffer from pneumoconiosis, Employer's Exhibits 1, 3. While the administrative law judge acknowledged that Dr. Amundson was the miner's treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); Decision and Order at 11, the administrative law judge nonetheless properly discredited Dr. Amundson's opinion because she found it to be not well reasoned,[8] *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Amundson's opinion because Dr. Amundson was the miner's treating physician. Moreover, since the administrative law judge properly discredited the only opinion of record that could support a finding of pneumoconiosis, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[9]

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[10] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *see also Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[8]The administrative law judge stated that Dr. Amundson "did not explain what role, if any, Claimant's reportedly past history of 'heavy smoking' may have played in the cause of his lung conditions." Decision and Order at 12.

[9]Claimant argues that the administrative law judge erred by finding that Dr. Amundson relied on an erroneous coal mine employment history. Specifically, claimant asserts that the parties did not stipulate to twenty-two years of coal mine employment as found by the administrative law judge. A review of the record reveals that none of the parties contested the issue of whether the miner worked **at least** twenty-two years of coal mine employment. Director's Exhibit 36. During the hearing, claimant's counsel stated that "[e]veryone in this claim has agreed that [the miner] worked **at least** twenty-two years in the mines." Hearing Transcript at 10 (emphasis added). Nonetheless, inasmuch as the administrative law judge provided a proper basis for discrediting Dr. Amundson's opinion, any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[10]In view of our affirmance of the administrative law judge's finding at 20 C.F.R. §718.202(a), we decline to address claimant's contentions with regard to 20 C.F.R. §§718.203 and 718.205(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge