

BRB No. 00-0230 BLA

BARBARA J. MOORE)	
(Widow of FRANKLIN L. MOORE))	
)	
Claimant-Petitioner))
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED:
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-0039) of Administrative Law Judge Daniel L. Leland 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

Claimant is Barbara J. Moore, the surviving spouse of the miner, Franklin J. Moore, who died on March 1, 1998. Director's Exhibit 5. The miner filed his

the miner with thirty-eight to forty years of coal mine employment and found that claimant failed to establish that the miner had suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that even if the existence of pneumoconiosis was established, the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's findings regarding the existence of pneumoconiosis and his weighing of the evidence at Section 718.205(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.

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 survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and 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 the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *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). The United States Court of Appeals for the Fourth Circuit, within whose

initial claim on June 1, 1988. Director's Exhibit 15. This claim was denied on October 21, 1988 for failure to establish evidence of total disability. Claimant took no further action until he filed his second claim on February 9, 1990. Director's Exhibit 15. The claim was initially approved by the District Director and employer appealed. Based on the written record, Administrative Law Judge Victor Chao denied the claim for failure to establish the existence of pneumoconiosis, and further determined that even if pneumoconiosis was established, the evidence did not establish that the miner's disabling pulmonary impairment was related to coal dust exposure. Director's Exhibit 15.

Claimant does not challenge the administrative law judge's findings at Section 20 C.F.R. §718.202(a)(3). Therefore, these findings are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-1276 (1983).

jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Shuff, supra*.

On appeal, claimant contends that the administrative law judge erred in his consideration of the x-ray evidence at Section 718.202(a)(1) in that his conclusion that the evidence neither precludes nor establishes the presence of pneumoconiosis fails to resolve the evidence in claimant's favor and violates applicable case law. In determining that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge first discussed the various "descriptive interpretations" of chest x-rays contained in the record and determined that although some noted abnormalities, none included a diagnosis of pneumoconiosis under the classification requirements pursuant to 20 C.F.R. §718.102(b). Decision and Order at 5. The administrative law judge then considered x-ray interpretations which had been discussed by Administrative Law Judge Chao. *Id.* The administrative law judge found that the x-ray evidence is in equipoise, and that "although a slim majority of the interpretations [is] positive for pneumoconiosis under the classification requirements, the majority of interpretations by dual-qualified B readers and Board-certified radiologists [is] negative for pneumoconiosis." Decision and Order at 13. The administrative law judge thus found that "the x-ray evidence neither precludes nor establishes the presence of pneumoconiosis." *Id.* Contrary to claimant's contention, the administrative law judge is not required to resolve a conflict in the evidence in claimant's favor when, as claimant concedes, the evidence is equivocal. Claimant's Brief at 3. Claimant bears the burden of affirmatively proving her case and no presumption is created in claimant's favor merely by presenting evidence which supports her entitlement to benefits. See *Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996). Thus, we affirm the administrative law judge's determination that the x-ray evidence of record fails to establish that the miner suffered from pneumoconiosis, as it is within his discretion to determine that claimant failed to meet her burden of proof. See *Ondecko, supra*; *Cole, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

Claimant also generally contends that the administrative law judge erred in his consideration of the autopsy evidence at Section 718.202(a)(2). The administrative law judge found that the autopsy prosector, Dr. Stead, listed "pulmonary anthracosis, mild" as one of the final anatomic diagnoses, while Drs. Naeye and Kleinerman, whom the administrative law judge found had excellent credentials in the field of pathology, provided well-reasoned opinions that the autopsy evidence did not establish the existence of pneumoconiosis. Decision and Order at 13-14. The

Board's scope of review requires that a party challenging a finding below address that finding and demonstrate why substantial evidence does not support the result reached or why the finding is contrary to law. See 20 C.F.R. §802.211(b); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). In the present case, claimant generally asserts that the administrative law judge erred by failing to credit Dr. Stead's opinion over the contrary opinions of Drs. Naeye and Kleinerman, but has failed to identify any specific error made by the administrative law judge in his evaluation of the evidence at Section 718.202(a)(2). Moreover, we note that the administrative law judge rationally relied on the opinions by better qualified physicians and credited the opinions he found to be better-reasoned. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Thus, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2).

Claimant next contends that the administrative law judge erred in his consideration

of the medical opinion evidence at Section 718.202(a)(4) in that he failed to discuss the West Virginia Occupational Board's finding of 40% pulmonary impairment, and instead relied upon Administrative Law Judge Chao's analysis of this evidence. Petition for Review at 3, 5. We disagree. The administrative law judge stated that:

[T]he earlier medical opinion evidence, which was previously set forth in Judge Chao's Decision and Order, is incorporated by reference herein.

In addition to the findings of the Occupational Pneumoconiosis Board of West Virginia, the earlier medical opinions of Drs. Lobl, Bellotte, Renn, and Dahhan, and the pathology reports discussed above, the case file also contains recent hospital records (DX 7, 13; EX 6), the miner's death certificate (DX 5), and the medical reports and/or depositions of Drs. Gaziano (DX 7), Hattler (CX 1), Angus (CX 2), Naeye (EX 5), and Bellotte (EX 8), as summarized below.

Decision and Order at 10. The administrative law judge found that the earlier medical evidence, previously discussed by Administrative Law Judge Chao, is conflicting. Decision and Order at 14. The administrative law judge then found that the preponderance of the earlier medical opinion evidence indicates that the miner's respiratory or pulmonary impairment was cigarette induced, and unrelated to coal mine dust exposure. *Id.*

We reject claimant's contention that the administrative law judge "abdicated his obligation to weigh the evidence and instead, accepted a previous finding by

Judge Chao in the miner's claim." Claimant's Brief at 5. The administrative law judge's Decision and Order indicates that he considered the medical opinion evidence submitted in the miner's claim and rationally concluded that the preponderance of the evidence fails to support a finding of pneumoconiosis, as this finding is supported by the opinions of Drs. Renn and Dahhan and the March 6, 1990 opinion of Dr. Bellotte. Director's Exhibit 15. Moreover, the administrative law judge referred to the findings of the Occupational Board, see Decision and Order at 10, 14, but implicitly found it to be outweighed by the evidence indicating that the miner did not suffer from pneumoconiosis. Thus, the administrative law judge's finding complies with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Claimant alleges no other error with respect to the administrative law judge's findings at Section 718.202(a)(4). Thus, we affirm the administrative law judge's finding that claimant has failed to meet her burden establishing the existence of pneumoconiosis at Section 718.202(a), as it is supported by substantial evidence. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a Part 718 survivor's claim, we affirm the administrative law judge's denial of benefits. *Trumbo, supra*; *Neeley, supra*.

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

SO ORDERED.

The administrative law judge's determination that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) is also supported by substantial evidence. The administrative law judge permissibly credited the opinions of the pathologists, Drs. Kleinerman and Naeye, as supported by the opinion of board-certified pulmonologist Dr. Gaziano and the miner's treating physician Dr. Bellotte, that pneumoconiosis did not contribute to the miner's death, over the contrary opinion of the miner's cardiac surgeon, Dr. Hattler, and the opinion of Dr. Angus, who opined that the miner's underlying respiratory disease contributed to the miner's death. Decision and Order at 17; Director's Exhibit 7; Claimant's Exhibit 1, 2; Employer's Exhibits 1, 3, 5, 8. As the administrative law judge rationally concluded that the preponderance of the evidence failed to establish that pneumoconiosis contributed to the miner's death, this finding is affirmed. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge