BRB No. 01-0142 BLA

FANNIE PENNINGTON (Widow of ELIGE PENNINGTON)	)	
Claimant-Petitioner	)	
v.	)	
LEECO, INCORPORATED	)	DATE ISSUED:
and	)	
ACCORDIA OF LEXINGTON	)	
Employer/Carrier- Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0315 and 00-0316) of

[1]Claimant is the surviving spouse of the deceased miner who died on January 25, 1999. Director's Exhibit 48.

Administrative Law Judge Donald W. Mosser denying benefits on claims 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 instant case involves both a miner's claim filed on April 24, 1997 and a survivor's claim filed on February 9, 1999. After crediting the miner with thirty-three years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). The administrative law judge further found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits on both the miner's claim and the survivor's claim. On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). By Order dated August 10, 2001, the Board rescinded its Order requiring the parties to submit briefs on the issue of the impact of the amended regulations on this case.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Claimant argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Claimant notes that the record contains three positive x-ray interpretations. Although the administrative law judge noted that Drs. Sargent and Barrett, each a B reader and a Board-certified radiologist, and Dr. Baker, a B reader, interpreted the miner's June 3, 1997 x-ray as positive for pneumoconiosis, Director's Exhibits 12-14, the administrative law judge accurately noted that three equally qualified physicians, Drs. Scott and Wheeler, each a B reader and Board-certified radiologist, and Dr. Fino, a B reader, interpreted this film as negative for pneumoconiosis. Decision and Order at 12; Director's Exhibits 28, 34. Because he found that the interpretations of claimant's June 3, 1997 x-ray were equally divided, the administrative law judge properly found that this x-ray did not support a finding of pneumoconiosis. *Id.* The administrative law judge also accurately noted that the record did not contain any other positive x-ray interpretations. Decision and Order at 12. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

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[3]Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. The administrative law judge credited the opinions of Drs. Broudy, Branscomb, Fino and Chandler, that claimant did not suffer from pneumoconiosis, over the contrary opinions of Drs. James, Nicholls and Baker. Decision and Order at 12-14. The administrative law judge discredited Dr. Baker's opinion that claimant suffered from pneumoconiosis because the smoking history upon which the doctor relied was not sufficiently detailed. Decision and Order at 13; Director's Exhibit 10. An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. *See Creech v. Benefits Review Board,* 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Because it is unchallenged on appeal, we affirm the administrative law judge's decision to discredit Dr. Baker's opinion on this basis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge discredited Dr. Nicholls's diagnosis of pneumoconiosis because it was rendered at a time when Dr. Nicholls was primarily treating claimant for a bleeding gastric ulcer. Decision and Order at 12; Director's Exhibit 33. The administrative law judge found that Dr. Nicholls's opinion was less than well reasoned and documented because he did not "chronicle [the miner's] coal mine employment." *Id.* Because Dr. Nicholls provided no basis for his diagnosis of "black lung," the administrative law judge properly discredited his opinion as being not sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the miner died after March 1, 1978, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306. Consequently, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

[4]Although Dr. Baker noted that the miner smoked one pack of cigarettes a day, he indicated that he was unaware of when the miner started smoking and when the miner stopped smoking. *See* Director's Exhibit 10.

Other physicians note an extensive smoking history. Dr. Nicholls noted that the miner had a "35+ pack year history of smoking." Director's Exhibit 33. Dr. Broudy similarly noted that the miner had smoked one to one and one-half packs of cigarettes a day for 30-35 years. Director's Exhibit 24.

[5]The miner was hospitalized from March 22, 1995 until March 25, 1995 for treatment of an active bleeding gastric ulcer. In a Discharge Summary dated June 8, 1995, Dr. Nicholls diagnosed a GI bleed, COPD, coronary artery disease, cirrhosis and black lung. Director's Exhibit 33.

The administrative law judge noted that Dr. James, the miner's treating physician, did not diagnose pneumoconiosis until the miner was hospitalized in October and November of 1996. Decision and Order at 13; Director's Exhibit 52. The administrative law judge noted that no x-ray taken at that time would support a diagnosis of pneumoconiosis. *Id.* The administrative law judge further noted that Dr. James's diagnosis appeared to be based upon a history provided by the miner himself rather than one adduced by the doctor based upon the medical evidence. *Id.* The administrative law judge also noted that Dr. James appeared to "have only a nebulous idea of [the miner's] coal mine employment history." *Id.* Because Dr. James provided no explanation for his diagnosis of pneumoconiosis, we hold that the administrative law judge properly found that Dr. James's opinion was not sufficiently reasoned. *See Lucostic, supra*; Decision and Order at 13.

The administrative law judge also permissibly accorded greater weight to the opinions of Drs. Broudy, Fino and Chandler that the miner did not suffer from pneumoconiosis based upon their superior qualifications. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 13; Director's Exhibits 24, 34, 41, 50; Employer's Exhibits 1, 2. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed

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[6]Claimant contends that Dr. James's opinion is entitled to greater weight based upon his status as the miner's treating physician. The United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, because the administrative law judge properly found that Dr. James's opinion was not sufficiently reasoned, the administrative law judge was not required to accord greater weight to his opinion based upon his status as claimant's treating physician. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

The administrative law judge did not address Dr. James's statement dated June 21, 1999 in which the doctor indicated that the miner suffered from coal workers' pneumoconiosis. *See* Director's Exhibit 53. However, because Dr. James provides no basis for his diagnosis of pneumoconiosis in his June 21, 1999 statement, we hold that the administrative law judge's failure to consider this evidence constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

[7]Drs. Broudy, Fino and Chandler are each Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibits 28, 34; Employer's Exhibit 1.

to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim under 20 C.F.R. Part 718. *Trent, supra*; *Gee, supra*; *Perry, supra*; *Trumbo, supra*. Consequently, we need not address the administrative law judge's findings at 20 C.F.R. §§718.204(b) (2000) and 718.205(c) (2000). *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge