BRB No. 01-0269 BLA

BRENDA FULLER (Widow of RONNIE FULLER)	)	
Claimant-Petitioner	)	
v.	)	
EASTERN COAL CORPORATION	)	DATE ISSUED:
and	)	
EMPLOYERS SERVICE CORPORATION	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Randy G. Clark (Clark & Johnson Law Offices), Pikeville, 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[1] appeals the Decision and Order (00-BLA-0189) of Administrative Law

[1]Claimant is the surviving spouse of the deceased miner who died on July 3, 1998. Director's Exhibit 10.

Judge Joseph E. Kane 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).[2] The instant case involves a survivor's claim filed on September 14, 1998. After

[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). 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*, 160 F.Supp.2d 47 (D.D.C. 2001).

crediting the miner with at least twenty one 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). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the autopsy 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. 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.[3]

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).

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).

[3]Inasmuch as no party has challenged the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(3) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see* 20 C.F.R. §718.202(a)(1), (a)(3).

Claimant argues that the administrative law judge erred in finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis. While Dr. Dennis, the autopsy prosector, diagnosed pneumoconiosis, Director's Exhibit 11, three reviewing pathologists, Drs. Caffrey, Naeye and Hutchins, opined that the miner did not suffer from the disease. Employer's Exhibits 1-3, 8, 10. When evaluating the pathology-related evidence, an administrative law judge must first determine the credibility and weight of the reviewing pathologists' contrary opinions before giving complete deference to a physician's opinion based upon his status as the autopsy prosector. *See generally Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). In the instant case, the administrative law judge found that while Dr. Dennis's opinion supported a finding of pneumoconiosis, it was outweighed by the contrary "well-reasoned" opinions of Drs. Caffrey, Naeye and Hutchins.[4] Decision and Order at 19. The administrative law judge, therefore, found that the autopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). *Id.* Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2).

Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis. Claimant specifically contends that the administrative law judge erred in finding the opinion of the miner's treating physician, Dr. Puram, insufficient to establish the existence of pneumoconiosis. We disagree. In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according less weight to Dr. Puram's opinion because he failed to adequately explain the basis for his finding that claimant suffered from pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 19-20; Director's Exhibits 13, 19, 26. The administrative law judge further noted that Drs. Broudy, Fino, Wright, Caffrey and

[4]The administrative law judge noted that Drs. Caffrey and Naeye are Board-certified in Anatomical and Clinical Pathology and that Dr. Hutchins is Board-certified in Anatomical Pathology. Decision and Order at 15-17; Employer's Exhibits 2-4. Dr. Dennis's qualifications are not found in the record.

Naeye did not find any evidence of coal workers' pneumoconiosis. Decision and Order at 20; Director's Exhibit 27; Employer's Exhibits 1-3, 5, 7, 9. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trumbo, supra*.

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