BRB No. 05-0517 BLA

LOIS S. KISER (Widow of DAN KISER) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 11/18/2005 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lois S. Kiser, Abingdon, Virginia, for claimant.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (04-BLA-5947) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim[1] 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 found that the evidence failed to establish the existence of

[1] The miner died on July 3, 2002. Director's Exhibit 3. Claimant filed a survivor's claim with the Department of Labor on October 4, 2002. *Id.*

pneumoconiosis pursuant to 20 C.F.R. §718.202(a), failed to establish the existence of complicated pneumoconiosis, and thereby, entitlement to the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, *see* 30 U.S.C. §921(c)(3), and failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on the survivor's claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is rational, in accordance with law, and supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

On appeal, claimant generally challenges the denial of benefits. Employer, in response, asserts that the administrative law judge properly found that the evidence fails to establish the existence of pneumoconiosis or that death was due to pneumoconiosis. 20 C.F.R. §§718.202(a)(1), (2), (4), 718.205(c). Employer also contends that the administrative law judge properly found that the evidence failed to meet the requirements for entitlement to the irrevocable presumption that death was due to pneumoconiosis. 20 C.F.R. §718.304. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not respond to the instant appeal.

In order to establish entitlement to benefits in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death is due to pneumoconiosis where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where death was caused by complications of pneumoconiosis, or where the presumption set forth at 20 C.F.R. §718.304, relating to complicated pneumoconiosis, is applicable. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205 (c); *Trumbo v. Reading Anthracite Coal 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)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

In finding that the existence of pneumoconiosis was not established, the administrative law judge considered the two x-ray interpretations of the one film. The administrative law judge concluded that the existence of pneumoconiosis was not established based on x-ray evidence as the x-ray was read negative for the existence of pneumoconiosis by both readers, who were dually qualified Board-certified, B-readers. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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). We affirm, therefore, the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

At Section 718.202(a)(2), the administrative law judge considered the autopsy report of Dr. Hudgens, whose qualifications were not in the record, and who found on gross description, a "marked bilateral paraseptal anthracosis with focal fibroanthracotic macule formation." Director's Exhibit 11. Dr. Hudgens also found a large macule in the right upper lobe of the miner which measured five centimeters by three centimeters. *Id*. Dr. Hudgens concluded that his autopsy findings were "consistent with mild coal workers' pneumoconiosis." Director's Exhibit 11. The administrative law judge found Dr. Hudgens's opinion was contradicted by the opinion of Dr. Caffrey, a Board-certified pathologist, who reviewed the autopsy slides and report, and opined that the miner's lungs showed no evidence of coal workers' pneumoconiosis or lesions but only a "mild to moderate amount of anthracotic pigment." Decision and Order at 6; Director's Exhibit 23. The administrative law judge further found that Dr. Caffrey testified on deposition that he did not see any macule that measured five centimeters by three centimeters as described by Dr. Hudgens and that this macule did not appear on a CT scan taken one month before the miner's death. Employer's Exhibit 3 at 20-21. Further, the administrative law judge correctly noted that Dr. Hudgens's report did not contain a microscopic examination of the miner's lungs, as required by regulation. 20 C.F.R. §718.106; Decision and Order at 6-7. The administrative law judge concluded, therefore, that the autopsy evidence did not support a finding of either simple or complicated pneumoconiosis and that the presumption at Section 718.304 was not invoked. This was rational. Decision and Order at 6-7; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Trumbo*, 17 BLR at 1-88; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *see* 20 C.F.R. §718.304(b); *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 243, 22 BLR 2-554 (4th Cir. 1999). We affirm, therefore, the administrative law judge's finding that the autopsy evidence fails to establish the existence of pneumoconiosis. 20 C.F.R. §§718.202(a)(2), 718.304.

Finally, the administrative law judge considered the medical opinion evidence at Section 718.202(a)(4), finding that the record contained four relevant opinions. Although the

administrative law judge concluded that Dr. Robinette's opinion (that claimant suffered from pneumoconiosis) was entitled to additional consideration because he was the miner's treating physician, Decision and Order at 11-13; Director's Exhibit 12, he permissibly gave greater credit to the opinions of Drs. Fino, Hippensteel and Caffrey (that the miner did not suffer from pneumoconiosis) because he found that they were better supported by the medical evidence of record. Decision and Order at 12-13; Employer's Exhibits 3, 4, 7; 20 C.F.R. §718.104(d)(5); *see Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Lucostic*, 8 BLR at 1-47. The administrative law judge therefore, properly found, on considering the x-ray, autopsy, and medical opinion evidence, that the evidence did not show that the miner had pneumoconiosis. *Island Creek Coal Company v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Likewise, the administrative law judge properly found, on considering the relevant evidence, that claimant was not entitled to the irrebuttable presumption that this miner's death was due to pneumoconiosis. 20 C.F.R. §718.304; *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Blankenship*, 177 F.3d 250, 22 BLR 2-554. Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established, we need not consider the administrative law judge's finding that death due to pneumoconiosis was not established. *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge