

BRB No. 06-0469 BLA

EUGENE H. HALL (Deceased))
CYNTHIA HALL EASTERLING)
(Surviving Spouse))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 11/20/2006
)
WINN CONSTRUCTION,)
INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE)
COMPANY)
)
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 – Denial of Benefits of Daniel F. Sutton,
Administrative Law Judge, United States Department of Labor.

Cynthia Hall Easterling, McHenry, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial

of Benefits (05-BLA-5236 and 05-BLA-5237) of Administrative Law Judge Daniel F. Sutton rendered on a subsequent miner's claim and 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).¹ The administrative law judge credited the miner with eighteen years of coal mine employment, and found that the existence of pneumoconiosis was not established based on the newly submitted evidence pursuant to 20 C.F.R. §718.202(a)(1)-(4). Assuming that the newly submitted evidence established the existence of pneumoconiosis, the administrative law judge found that the miner did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).² The administrative law judge concluded that the miner did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and denied the miner's subsequent claim. Turning to the survivor's claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis and did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205(c). Thus, the administrative law judge denied the survivor's claim. Claimant appeals generally, without the assistance of counsel. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ The instant case is governed by the regulations that took effect on January 19, 2001 as it involves a subsequent miner's claim filed on September 13, 2002 and a survivor's claim filed on December 18, 2003. The miner died on November 2, 2003.

² Administrative Law Judge Thomas F. Phalen, Jr., denied the miner's prior claim on October 30, 1997, finding that the miner did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), total disability or total disability due to pneumoconiosis at 20 C.F.R. §718.204. Thus, all elements of entitlement were, in fact, previously adjudicated against the miner.

Initially, we address claimant's appeal of the administrative law judge's denial of benefits on the miner's subsequent claim. The administrative law judge found that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The newly submitted x-ray evidence consists of interpretations of x-rays taken on December 4, 2002, and February 21, 2003.³ In considering the newly submitted x-ray evidence, the administrative law judge gave greater weight to the readings by Drs. Powell, West, and Wiot because they are highly qualified readers. Decision and Order at 6. The administrative law judge also relied on the numerical superiority of the negative interpretations. *Id.* An administrative law judge must consider the quantity of the x-ray evidence in light of the difference in the qualifications of the readers. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). As the administrative law judge found that the existence of pneumoconiosis was not established by the newly submitted x-ray evidence based on the superior radiological qualifications of Drs. Powell, West, and Wiot, and the preponderance of negative interpretations, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).⁴ Decision and Order at 5-6; Director's Exhibit 12; Employer's Exhibits 1-3.

The administrative law judge additionally found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). Because there is no biopsy or autopsy evidence, and the presumptions at 20 C.F.R. §§718.304-718.306 are inapplicable, the administrative law judge properly found that the newly submitted evidence was insufficient to establish the existence

³ Dr. Powell, a B reader, interpreted the miner's December 4, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. While Dr. Simpao, who has no radiological qualifications, interpreted the miner's February 21, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 12, Drs. West and Wiot, both Board-certified radiologists and B readers, interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibits 2, 3.

⁴ The administrative law judge considered Dr. O'Bryan's newly submitted medical opinion that claimant has pneumoconiosis at 20 C.F.R. §718.202(a)(4) and at 20 C.F.R. §718.202(a)(1). Any error in the administrative law judge's consideration of Dr. O'Bryan's opinion that claimant has pneumoconiosis at Section 718.202(a)(1) is harmless where the administrative law judge relied on the superior radiological qualifications of Drs. Powell, West, & Wiot, and the preponderance of the negative interpretations. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 6.

of pneumoconiosis at Section 718.202(a)(2) and (a)(3).⁵ Decision and Order at 7.

The administrative law judge next found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Drs. Dahhan, Fino, and Powell, all Board-certified in internal medicine and pulmonary disease, opined that the miner did not have pneumoconiosis. Employer's Exhibits 1, 4-7. Drs. O'Bryan and Simpao, whom the administrative law judge referred to as "general practitioners," stated that the miner suffered from pneumoconiosis.⁶ Director's Exhibits 12, 42. The administrative law judge gave greater weight to the opinions of Drs. Dahhan, Fino, and Powell based on their qualifications as pulmonary specialists and because he found that their opinions were more detailed and persuasive. Decision and Order at 8. An administrative law judge may consider the qualifications of a physician in determining the relative weight to be accorded an opinion, when other opinions of record are both probative and conflicting regarding an issue. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-22 (1994). Moreover, an administrative law judge may reject a medical opinion where he finds the doctor failed to adequately explain his diagnosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Conversely, an administrative law judge may credit a medical opinion where he finds the doctor better explained his

diagnosis. Thus, we affirm the administrative law judge's decision to assign greater weight to the opinions of Drs. Dahhan, Fino, and Powell on these bases.

The administrative law judge gave little weight to Dr. O'Bryan's opinion of pneumoconiosis, finding it was unreasoned and undocumented since Dr. O'Bryan did not set forth the data and observations underlying his opinion. A documented report sets forth the clinical findings and observations on which the physician has based his diagnosis. *Fuller v.*

⁵ Claimant testified at deposition that no autopsy was performed, but that a biopsy was performed by Dr. O'Bryan in September 2003. Director's Exhibit 43 at 3. Dr. O'Bryan's biopsy report is not in the record. There is no evidence of complicated pneumoconiosis in the record; thus, the presumption at 20 C.F.R. §718.304 is inapplicable. The instant miner's and survivor's claims were filed after 1982; consequently, the presumptions at 20 C.F.R. §§718.305 and 718.306 do not apply.

⁶ The qualifications of Drs. O'Bryan and Simpao are not in the record. Any error in the administrative law judge's consideration of Drs. O'Bryan and Simpao as "general practitioners" is harmless, however, since the administrative law judge gave greater weight to the opinions of the physicians with superior qualifications, as reflected in the record. *Larioni, supra*.

Gibraltar Coal Corp., 6 BLR 1-1291 (1983). It is within the discretion of the administrative law judge to determine whether a physician's conclusions are adequately supported by their underlying documentation. *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Thus, as an administrative law judge may give little weight to a report which he finds undocumented, we affirm the administrative law judge's decision to give little weight to Dr. O'Bryan's opinion on this basis.⁷

In light of the foregoing, the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), based on the newly submitted evidence, are affirmed. Moreover, inasmuch as the existence of pneumoconiosis was not established in the miner's prior claim, and claimant did not contest it, we affirm the finding that the existence of pneumoconiosis is not established on the merits, based on all the evidence of record. Therefore, entitlement is precluded under the Act in the miner's claim. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Consequently, we affirm the administrative law judge's denial of benefits on the miner's subsequent claim.

Next, we address claimant's appeal of the administrative law judge's denial of benefits on the survivor's claim. The administrative law judge denied the survivor's claim after finding 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). The opinions of Drs. Dahhan, Fino, O'Bryan, Powell, and Simpao do not support a finding that the miner's death was due to pneumoconiosis.⁸ Director's Exhibits 12, 42; Employer's Exhibits 1, 4-7. Neither does the

⁷ Since the administrative law judge provided two valid reasons for giving little weight to Dr. O'Bryan's opinion, we need not address the administrative law judge's remaining basis for giving Dr. O'Bryan's opinion little weight. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983).

⁸ Dr. Dahhan stated that the miner died as a result of a heart attack, and that the miner also suffered from lung cancer, conditions of the general public at large; thus, Dr. Dahhan concluded that the miner's death was not due to pneumoconiosis. Employer's Exhibit 4. Dr. Dahhan reiterated his opinion at his deposition. Employer's Exhibit 6 at 11-12. Dr. Fino concluded that the miner's death was due to lung cancer and a heart attack, and that coal mine dust inhalation played no role in his death. Employer's Exhibit 5. Dr. Fino testified at deposition that coal dust inhalation did not cause, contribute to, or hasten the miner's death. Employer's Exhibit 7 at 15. Drs. Powell and Simpao examined the miner prior to his death, and thus did not render an opinion on the cause of the miner's death. Director's Exhibit 12 at 37-40; Employer's Exhibit 1. Dr. O'Bryan checked "no" indicating that the miner's pneumoconiosis did not contribute to or play a hastening role in his death. Director's Exhibit 42.

death certificate support such a finding.⁹ Director's Exhibit 41. Because none of the medical evidence of record establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), we affirm the administrative law judge's denial of benefits on the survivor's claim.¹⁰ See *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁹ The death certificate lists the cause of the miner's death as myocardial infarction [heart attack] due to lung cancer. Director's Exhibit 41.

¹⁰ Consequently, we need not address the administrative law judge's finding that the existence of pneumoconiosis was not established on the survivor's claim. Decision and Order at 9.

JUDITH S. BOGGS
Administrative Appeals Judge