BRB No. 06-0490 BLA

JANICE SPENCE (Widow of DONALD SPENCE) Claimant-Petitioner v. ISLAND CREEK COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/30/2006 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Janice Spence, Wharncliffe, West Virginia, *pro se*.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIUM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (05-BLA-5174) of Administrative Law Judge Jeffrey Tureck 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 miner died on February 12, 2003, and claimant filed her application for survivor's benefits on May 6, 2003. Director's Exhibits 2, 7. In a Decision and Order dated March 7, 2006, the administrative law judge credited the miner with thirty-two years of coal mine

employment[1] and found that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). 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); *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). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consisted of two readings of a February 16, 2000 x-ray as well as several x-ray readings taken at Logan General Hospital during the miner's treatment for multiple myeloma. Decision and Order at 2. As the February 16, 2002 x-ray was read

[1] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

uniformly negative by Dr. Wheeler and Dr. Scott, who are dually qualified Board-certified radiologists and B readers, and as the hospital x-rays results did not mention the existence of pneumoconiosis, the administrative law judge properly found that the preponderance of the chest x-ray evidence did not establish the presence of pneumoconiosis. Director's Exhibits 10-13; Decision and Order at 2. As the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly concluded, based on the weight of the negative x-ray readings, that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence, *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Director's Exhibits 10-13; Decision and Order at 2, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge also found, correctly, that the record contains no relevant biopsy evidence and no autopsy evidence, to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 3.

Finally, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the death certificate, treatment records from Logan General Hospital, several computerized tomography (CT) scan results, and the findings of the Kentucky Workers' Compensation Board, in addition to the medical reports and testimony of Drs. Zaldivar and Castle. Initially, the administrative law judge noted that neither the death certificate nor the hospital treatment records contained any diagnoses of coal workers' pneumoconiosis or any other chronic dust disease or impairment arising out of coal mine employment. Director's Exhibits 9-11; Decision and Order at 3-4. Similarly, none of the CT scans were read as positive for the existence of pneumoconiosis.[2] Director's Exhibits 1, 11; Employer's Exhibits 3, 5-8; Decision and Order at 3. In addition, both Dr. Zaldivar and Dr. Castle, who each reviewed the relevant medical evidence of record, opined that the miner did not have coal workers pneumoconiosis or any chronic dust

[2] The administrative law judge properly noted that the admission into the record of five readings of the February 7, 2003 computerized tomography (CT) scan is now contrary to the Board's decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring). The administrative law judge permissibly concluded, however, that as the CT scans of record are uniformly negative, the inclusion of the extra reading would not change the outcome of this case, and, therefore is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

disease or impairment arising out of coal mine employment. Employer's Exhibits 2, 4; Decision and Order at 4. By contrast, the Kentucky Workers' Compensation Board found that the miner was totally disabled due to pneumoconiosis in a decision dated November 8, 1982. Director's Exhibit 7; Decision and Order at 3. The administrative law judge permissibly found, however, that as the Kentucky Workers' Compensation Board determination is inconsistent with the medical evidence of record, and is not binding on the instant claim, the determination was entitled to little weight. *Schegan v. Waste Management & Processors*, Inc., 18 BLR 1-41 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 3.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983), and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a). We, therefore, affirm the administrative law judge's denial of benefits.

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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BETTY JEAN HALL
Administrative Appeals Judge