

BRB Nos. 10-0188 BLA
and 10-0201 BLA

DILLARD WIGHT, o/b/o the Estate of)
LINDA WIGHT)
(Widow of WILLIE WIGHT))

Claimant-Petitioner)

v.)

CHARAH CONSTRUCTION COMPANY,)
INCORPORATED)

Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 11/19/2010

DECISION and ORDER

Appeal of the Decision and Order Denial of Benefits of Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for
employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denial of Benefits of Administrative
Law Judge Daniel F. Solomon rendered on a miner's claim (2006-BLA-05223) and a
survivor's claim (2006-BLA-05222) filed pursuant to the provisions of the Black Lung
Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124

Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).¹ The administrative law judge credited the miner with 6.56 years of coal mine employment and adjudicated both claims pursuant to 20 C.F.R. Part 718. With respect to the miner's claim, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits of the claim, however, the administrative law judge found that claimant did not prove that the miner had pneumoconiosis under 20 C.F.R. §718.202(a). With respect to the survivor's claim, the administrative law judge also determined that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits in both claims.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4).² Employer responds, urging affirmance of the denial of benefits in

¹ Claimant is Dillard Wight, the miner's son. The miner, Willie Wight, filed his initial claim for benefits on August 10, 2000, which the district director denied on November 13, 2000. Director's Exhibit 1. The miner did not pursue the claim further until filing a subsequent claim on June 13, 2003. Director's Exhibit 3. In a Proposed Decision and Order, the district director issued a determination that the miner was entitled to benefits. Director's Exhibit 30. Employer timely requested a hearing and the case was referred to the Office of Administrative Law Judges (OALJ). Director's Exhibit 32. The miner died on November 24, 2004, while his claim was pending. Director's Exhibit 54. The miner's widow, Linda Wight, filed a survivor's claim for benefits on December 17, 2004, which was consolidated with the miner's claim. Director's Exhibits 47, 49. The district director issued a Proposed Decision and Order denying benefits in the survivor's claim. Director's Exhibit 69. Both the miner's claim and the survivor's claim were forwarded to the OALJ. On November 22, 2006, the miner's widow died. Director's Exhibit 82. Both claims were remanded to the district director for further proceedings. *Id.* Claimant submitted correspondence in which he indicated that he would pursue the claims, and the claims were again referred to the OALJ for a formal hearing. *Id.* Administrative Law Judge Daniel F. Solomon conducted a formal hearing on March 25, 2009.

² In acknowledging claimant's appeal, the Board inadvertently misstated the case numbers associated with the miner's claim and the survivor's claim. *Wight v. Charah Construction Co., Inc.*, BRB Nos. 10-0188 and 10-0201 BLA (Jan. 15, 2010) (unpub. Order). The correct case number for the survivor's claim is 2006-BLA-05222 and the correct case number for the miner's claim is 2006-BLA-05223. These claims have been consolidated for decision.

both claims. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that the miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that the miner was totally disabled, and that his total disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In order to establish entitlement to survivor's benefits in a claim filed pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that the miner suffered from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *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 the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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);

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that the miner had 6.56 years of coal mine employment and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) in both the miner's claim and the survivor's claim. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see* Decision and Order at 6, 13-14.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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*, 11 BLR at 1-27.

In this case, the administrative law judge found that the threshold element of the existence of pneumoconiosis was not established in either the miner's claim or the survivor's claim pursuant to 20 C.F.R. §718.202(a). The administrative law judge rendered identical findings, based on the same evidence in both claims, that the x-ray and medical opinion evidence were insufficient to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered nine readings of four x-rays dated March 14, 2003, July 21, 2003, September 8, 2003 and February 10, 2004, and considered the readers' radiological qualifications. Dr. Baker, a B reader, and Dr. Alexander, a Board-certified radiologist and B reader, interpreted the March 14, 2003 x-ray as positive for pneumoconiosis, while Drs. Scott and Scatarige, who are both Board-certified radiologists and B readers, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibits 13, 14; Claimant's Exhibit 1; Employer's Exhibit 12. Dr. Alexander and Dr. Simpao, who has no known radiological qualifications, interpreted the July 21, 2003 x-ray as positive for pneumoconiosis, while Dr. Scatarige interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 2; Employer's Exhibit 11. Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the September 8, 2003 and February 10, 2004 x-rays as negative for pneumoconiosis. Director's Exhibit 47.

After noting that the radiological qualifications of Drs. Wheeler, Scott, Scatarige and Alexander were superior to those of Drs. Simpao and Baker, the administrative law judge stated that "[f]ive negative readings were made by dually qualified readers as opposed to two [positive readings], both by Dr. Alexander." Decision and Order at 8. The administrative law judge also noted that Dr. Wheeler's negative reading of the most recent x-ray, obtained on February 10, 2004, was uncontradicted. *Id.* The administrative law judge determined that "the more recent x-ray is more indicative that the [m]iner did not have pneumoconiosis." *Id.* Based upon these findings, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), by a preponderance of the evidence. *Id.*

Claimant argues that the administrative law judge improperly relied on the x-ray readers' credentials, erred in deferring to the numerical superiority of the negative readings and selectively analyzed the x-ray evidence. We disagree. Contrary to claimant's contention, the administrative law judge rationally determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, based upon his finding that the preponderance of interpretations by highly qualified readers was negative for pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-

271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Because the administrative law judge relied on an appropriate qualitative and quantitative analysis of the x-ray evidence, we affirm his finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.*

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the miner's death certificate and the medical reports of Drs. Baker, Simpao, Broudy and O'Bryan.⁵ Director's Exhibits 11, 13, 14, 47. Dr. Baker examined the miner on May 14, 2003 and reported a coal mine employment history of thirteen and one-half years. Director's Exhibit 13. Dr. Baker diagnosed coal workers' pneumoconiosis, 1/0, based upon an x-ray and the miner's history of coal dust exposure. *Id.* Dr. Baker also diagnosed bronchitis, chronic obstructive pulmonary disease (COPD) and moderate hypoxemia due to coal dust exposure and smoking. *Id.* Dr. Simpao examined the miner on July 21, 2003 and reported that the miner worked in coal mine employment from January 1, 1982 through January 1, 1994. Director's Exhibit 11. Dr. Simpao diagnosed coal workers' pneumoconiosis, 1/2, due to coal dust exposure. *Id.* Dr. Broudy examined the miner on September 8, 2003 and diagnosed severe COPD due to smoking. Director's Exhibit 47. Dr. O'Bryan examined the miner on February 10, 2004 and diagnosed severe emphysema due to smoking. Director's Exhibit 14.

The administrative law judge discredited the opinions of Drs. Baker and Simpao, as they relied on an inaccurate coal mine employment history. Decision and Order at 9. Because Drs. Baker and Simpao were the only physicians to diagnose pneumoconiosis, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Id.*

Claimant contends that the administrative law judge erred in rejecting the opinions of Drs. Baker and Simpao based on their reliance "upon inaccurate work histories." Claimant's Brief at 5. In addition, claimant argues that the reports of Drs. Baker and Simpao were well-reasoned and should not have been rejected.

Claimant's allegations of error are without merit. The administrative law judge acted within his discretion as fact-finder in discounting the opinions of Drs. Baker and Simpao, because they relied upon an assumption "that the [m]iner had more than ten years [of coal dust] exposure," whereas the administrative law judge credited the miner with only 6.56 years of coal mine employment. *See Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21

⁵ Dr. Leigh prepared the miner's death certificate and identified the cause of death as "Chronic Obstructive Pulmonary Disease." Director's Exhibit 54.

BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson*, 12 BLR at 1-113; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 9. Thus, we affirm the administrative law judge's determination that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as it is rational and supported by substantial evidence.⁶ We also affirm, therefore, the administrative law judge's finding that claimant did not prove that the miner had pneumoconiosis under 20 C.F.R. §718.202(a) in either the miner's claim or the survivor's claim.

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in both the miner's claim and the survivor's claim, we also affirm the administrative law judge's denial of benefits in both claims.⁷ *See Trumbo*, 17 BLR at 1-88; *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

⁶ In light of our affirmance of the administrative law judge's decision to discredit the opinions of Drs. Baker and Simpao, as they relied on an inaccurate understanding of the length of the miner's coal mine employment, we need not address claimant's contention that the administrative law judge erred in rejecting these opinions because the physicians relied on "inaccurate x-ray interpretations." Claimant's Brief at 5; *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983).

⁷ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claims were filed prior to January 1, 2005. Director's Exhibits 3, 49.

Accordingly, the Decision and Order Denial of Benefits of the administrative law judge in the miner's and survivor's claims is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge