BRB No. 06-0291 BLA

FREDA COLWELL (Widow of ELIHUE COLWELL)	)	
Claimant-Petitioner	)	
v.	)	
SUNFIRE COAL COMPANY, INCORPORATED	)	
and	)	
	)	DATE ISSUED: 10/31/2006
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6076) of Administrative Law Judge Robert L. Hillyard 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).[1] The administrative law judge credited the miner with five years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis caused by coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203, or that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant also alleges error in the administrative law judge's finding that the miner's death was not due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a brief in this appeal.[2]

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. 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).

We first consider claimant's challenges to the administrative law judge's findings regarding the existence of pneumoconiosis. Claimant asserts that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant specifically contends that the administrative law judge improperly relied on the qualifications of the physicians interpreting the x-rays as negative, and on the numerical superiority of the negative x-ray interpretations.

The administrative law judge noted that the record contains numerous x-ray interpretations. The administrative law judge considered the two x-ray interpretations of Dr. Wiot, who is both a Board-certified radiologist and a B reader, of films taken on January 14, 2002, and January 10, 2002. Dr. Wiot rated these films as quality 3, and opined that they were

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[1] Claimant is the widow of the miner who died on January 16, 2002. Director's Exhibit 11. The administrative law judge noted that the miner had filed four living miner's claims, in 1986, 1990, 1994 and 1999, all of which were denied by the district director, and all of which became final because the miner did not timely request a formal hearing. Director's Exhibit 1.

[2] We affirm the administrative law judge's length of coal mine employment finding, as well as his finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), as these finding are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

negative for pneumoconiosis. Employer's Exhibit 1. The administrative law judge accorded these interpretations little probative weight because of the poor film quality. The record also contains reports from interpretations of numerous x-rays taken during claimant's hospitalizations in 2000, 2001, and 2002. Director's Exhibit 12. None of these interpretations diagnoses coal workers' pneumoconiosis. *Id.* The administrative law judge stated that he would not consider the x-ray interpretations contained in hospital records. He noted that they were not taken for the purpose of diagnosing pneumoconiosis, as they do not contain film quality, profusion determinations or the qualifications of the physicians who provided the interpretations. Decision and Order at 8. The administrative law judge concluded that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1).

Because the record does not contain <u>any</u> x-ray interpretations diagnosing coal workers' pneumoconiosis, and thus supporting claimant's burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to this subsection. Consequently, we need not address the specific assertions raised by claimant regarding the administrative law judge's weighing of the x-ray evidence.

Regarding the administrative law judge's weighing of the evidence pursuant to 20 C.F.R. §718.202(a)(4), claimant asserts that the administrative law judge erred by not relying on the opinion of Dr. Koura. Claimant argues that Dr. Koura's opinion is well-reasoned and that the administrative law judge erred by failing to consider Dr. Koura's status as the miner's treating physician, which, claimant asserts, entitles his opinion to substantial weight. Claimant also contends that the administrative law judge erred by substituting his opinion for that of a physician.

The administrative law judge found Dr. Koura's diagnosis of coal workers' pneumoconiosis to be based solely on the miner's abnormal chest x-ray and his history of coal dust exposure, and thus found it neither well-reasoned nor well-documented.[3] Decision and Order at 10. The administrative law judge also found that Dr. Koura's diagnoses of bullous emphysema and chronic obstructive pulmonary disease with exacerbation due to cigarette smoking do not constitute diagnoses of legal pneumoconiosis. In contrast, the administrative law judge found Dr. Jarboe's opinion, that the miner did not have pneumoconiosis, to be both well-reasoned and well-documented. The administrative law judge therefore concluded that claimant had not established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

[3] In his deposition, Dr. Koura stated that he diagnosed coal workers' pneumoconiosis based on claimant's chest x-ray and his history of coal mine employment. Dr. Koura was not able to provide the date of the x-ray he relied upon. Employer's Exhibit 3 at 5. The record does not contain an x-ray interpretation by Dr. Koura.

The record also contains a Death Summary written by Dr. Koura, on which he lists fifteen discharge diagnoses, including "acute on chronic respiratory failure", chronic obstructive pulmonary disease with acute exacerbation/advanced lung disease, and coal workers' pneumoconiosis. Director's Exhibit 12. The death certificate, signed by Dr. Koura, lists the immediate cause of death as acute respiratory failure, due to chronic obstructive lung disease, due to coal workers' pneumoconiosis, due to coronary artery disease. Director's Exhibit 11. The record also contains: a 2002 treatment note by Dr. Koura, referencing coal workers' pneumoconiosis in the medical history; and several 2001 and 2002 discharge summaries by Dr. Paily, indicating chronic obstructive pulmonary disease. Director's Exhibit 12. Progress notes from Dr. Varghese in 2000 and 2001 indicate chronic obstructive pulmonary disease and "severe end stage lung disease." *Id.* In a deposition on April 25, 2003, Dr. Koura stated that he had treated the miner from January 14, 2002 until his death on January 16, 2002. Dr. Koura indicated that the miner's family told him of the miner's history of coal workers' pneumoconiosis, but that he also independently diagnosed coal workers' pneumoconiosis, based on an x-ray and the miner's history of dust exposure. Employer's Exhibit 3 at 5. Dr. Jarboe reviewed the miner's medical records and opined that the miner did not suffer from coal workers' pneumoconiosis. Dr. Jarboe stated that the miner's severe pulmonary emphysema was caused by his long history of heavy cigarette smoking. Employer's Exhibit 2.

We reject claimant's arguments that Dr. Koura's opinion is well-reasoned, and, thus, should have been relied upon. The administrative law judge permissibly found that Dr. Koura's diagnosis of pneumoconiosis, based on an x-ray interpretation and the miner's coal mine employment, is inadequately explained. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988). Further, we affirm the administrative law judge's finding that the diagnoses of pneumoconiosis in treatment notes and on the death certificate are not well-documented, as there is no explanation for these diagnoses, nor is any basis provided for these diagnoses. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In addition, we reject claimant's assertion that Dr. Koura's opinion is entitled to determinative weight because he treated the miner. The regulations do not require that the opinion of a treating physician be accorded determinative weight. 20 C.F.R. §718.104(d). Rather, Section 718.104(d) sets out the factors to be considered by the adjudicator in evaluating the opinion of a treating physician. In addition, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the opinion of a treating physician is not automatically entitled to deference. Instead, the administrative law judge must consider the credibility of each medical opinion, and the opinion of a treating physician is entitled to deference based on its power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Therefore, a report that the administrative law judge finds is not well reasoned or well documented cannot be rehabilitated, and deemed credible, merely because it is written by a treating physician. *Id.*

Further, because claimant fails to provide any support for his assertion that the administrative law judge substituted his opinion for that of a medical expert in his consideration of the evidence at Section 718.202(a)(4), and since a review of the administrative law judge's Decision and Order reveals no instance where the administrative law judge substituted his opinion for that of a medical expert, we reject claimant's assertion to the contrary.

As claimant makes no further allegation of error pursuant to Section 718.202(a), we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis. As claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in this survivor's claim, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), we need not address claimant's assertions regarding the administrative law judge's findings pursuant to Section 718.205. Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Denial of 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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REGINA C. McGRANERY
Administrative Appeals Judge