

BRB No. 12-0098 BLA

RITA JOHNSON)
(Widow of CLIFFORD JOHNSON))

Claimant-Petitioner)

v.)

DALE TRIVETTE TRUCKING COMPANY)

and)

TRAVELERS INSURANCE COMPANY)

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

DATE ISSUED: 10/18/2012

DECISION and ORDER

Appeal of the Decision and Order of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (09-BLA-5483) of Administrative Law Judge Robert B. Rae denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on January 30, 2008.

After crediting the miner with thirteen years of coal mine employment,² the administrative law judge found that the evidence did not establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the autopsy and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis. Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.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. 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).

Benefits are payable on survivors' claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c);

¹ Claimant is the widow of the miner, who died on April 23, 2007. Director's Exhibit 9.

² The miner's last coal mine employment was in Kentucky. Director's Exhibits 3, 7. Accordingly, the Board will apply the law 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).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had thirteen years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because the miner was not receiving benefits at the time of his death and had less than fifteen years of coal mine employment, the recent amendments to the Act, which became effective on March 23, 2010, do not apply in this case. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)).

Neeley v. Director, OWCP, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Claimant argues that the administrative law judge erred in finding that the autopsy evidence and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4).⁴ Regarding the autopsy evidence, the administrative law judge considered the opinions of Drs. Dennis, DeLara, Caffrey, and Oesterling. Dr. Dennis, the prosector, diagnosed anthrosilicosis. Director's Exhibit 11. Based upon a review of the miner's autopsy slides, Dr. DeLara also diagnosed coal workers' pneumoconiosis. Director's Exhibit 17; Claimant's Exhibit 2. Drs. Caffrey and Oesterling also reviewed the miner's autopsy slides, but opined that, based on the minimal amount of anthracotic pigment present in the miner's lungs, the miner did not suffer from pneumoconiosis. Employer's Exhibits 2, 4. The administrative law judge credited the opinions of Drs. Caffrey and Oesterling that the autopsy evidence did not support a finding of pneumoconiosis. The administrative law judge specifically found that Drs. Caffrey and Oesterling convincingly explained that "many slides or parts of slides that appeared to show anthracotic pigment in actuality showed hemosiderin related to [the miner's] heart disease."⁵ Decision and Order at 19. The administrative law judge, therefore, found that the autopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Id.* at 20.

Claimant contends that the administrative law judge should have accorded greater weight to Dr. DeLara's opinion because, unlike Drs. Caffrey and Oesterling, he personally examined the miner prior to his death. Contrary to claimant's characterization, there is no evidence in the record that Dr. DeLara examined the miner prior to his death. Director's Exhibit 17; Claimant's Exhibit 2. Claimant's remaining statements regarding the administrative law judge's consideration of the autopsy evidence amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

⁴ Claimant does not argue that the evidence supports a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3).

⁵ The administrative law judge noted that Drs. Caffrey and Oesterling were Board-certified in anatomical and clinical pathology. Decision and Order at 9, 12. Employer's Exhibits 4, 10. The record does not contain the qualifications of Drs. Dennis and DeLara.

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically argues that the administrative law judge erred in finding that Dr. Johnson's opinion did not establish legal pneumoconiosis.⁶ Dr. Johnson diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure. Claimant's Exhibit 1.

Claimant argues that the administrative law judge should have accorded greater weight to Dr. Johnson's opinion, based upon his status as the miner's treating physician. An administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). Because Dr. Johnson did not provide an adequate explanation for attributing the miner's COPD to his coal mine dust exposure, the administrative law judge permissibly found that his diagnosis was not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *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); Decision and Order at 17. Consequently, we reject claimant's contention that the administrative law judge was required to accord Dr. Johnson's opinion greater weight, based upon his status as the miner's treating physician.

Because claimant does not assert any other error in regard to the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-87-88.

⁶ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge