BRB No. 08-0192 BLA

J.E.M. (Widow of C.C.M.) Claimant-Petitioner v. GARDEN CREEK POCAHONTAS COMPANY and ISLAND CREEK COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/18/2008 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

J.E.M., Oakwood, Virginia, *pro se*.[1]

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

[1] Brenda Yates, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 – Denying Benefits (06-BLA-5708) of Administrative Law Judge Larry W. Price rendered 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 April 30, 2005, and claimant filed her claim for survivor's benefits on May 26, 2005. Director's Exhibits 2, 8. The administrative law judge credited the miner with at least eighteen years of coal mine employment[2] and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), pursuant to the parties' stipulations. The administrative law judge also found that claimant did not establish entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis by establishing that he had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds that the Board lacks jurisdiction to consider claimant's appeal. Alternatively, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief to claimant's appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by

[2] The record indicates that the miner's coal mine employment was in Virginia. Hearing Transcript at 16. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis and that it arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

substantial evidence, are rational, and are 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).

To establish entitlement to survivor's benefits, 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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

Section 718.304 provides that there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter and would be classified in category A, B, or C; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.[4]

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[4] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption . . . that a miner's death was due to pneumoconiosis . . . if such miner . . . suffered from a chronic dust disease of the lung which:
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> > (a) When diagnosed by chest X-ray...yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc).*

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge properly found that none of the three x-rays of record was positive for complicated pneumoconiosis. Drs. Wheeler and Wiot, both Board-certified radiologists and B readers, interpreted the November 21, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 7. Dr. Patel, a B reader, interpreted the October 25, 2004 x-ray as showing a density in the right upper lobe that could represent the chronic changes of progressive massive fibrosis, but he could not exclude pneumonia or a mass. Claimant's Exhibit 1. Substantial evidence supports the administrative law judge's finding that the x-ray evidence did not support a finding of complicated pneumoconiosis since Drs. Wheeler and Wiot read the November 21, 2002 x-ray as negative for pneumoconiosis, and Dr. Patel did not classify the October 25, 2004 x-ray as category A, B, or C. 20 C.F.R. §718.304(a); *U.S. Steel Mining Co. v. Director, OWCP, [Jarrell]*, 187 F.3d 384, 391, 21 BLR 2-639, 2-652-53 (4th Cir. 1999); *Melnick*, 16 BLR at 1-37. We, therefore, affirm the administrative law judge's finding pursuant to Section 718.304(a).

Pursuant to Section 718.304(b), the administrative law judge discussed and weighed the opinions of Drs. Crouch, Hudgens, and Roggli. Dr. Hudgens, whose qualifications are not in the record, conducted an autopsy limited to the chest and diagnosed complicated pneumoconiosis. Director's Exhibit 11. Drs. Crouch and Roggli, whom the administrative law judge noted are Board-certified in, and are professors of,

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> which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

Pathology, and are recognized as experts in the field of Pulmonary Pathology,[5] reviewed the autopsy slides of the miner's lungs and concluded that the miner had simple pneumoconiosis but did not have complicated pneumoconiosis. Employer's Exhibits 1, 2, 8. The administrative law judge permissibly credited the opinions of Drs. Crouch and Roggli over that of Dr. Hudgens based on the former physicians' superior qualifications. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998). Contrary to claimant's specific assertion, the administrative law judge was not required to credit Dr. Hudgens' opinion merely because he performed the autopsy. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-262 (4th Cir. 2000). Thus, we affirm the administrative law judge's finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b).

Pursuant to Section 718.304(c), the administrative law judge correctly found that there was no evidence diagnosing complicated pneumoconiosis by other means. Decision and Order at 15; Director's Exhibit 8; Claimant's Exhibits 1-3; Employer's Exhibits 3, 6. We therefore affirm the administrative law judge's finding pursuant to Section 718.304(c).

Consequently, the administrative law judge's finding that claimant did not establish complicated pneumoconiosis pursuant to Section 718.304 is affirmed. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33.

Pursuant to Section 718.205(c), the administrative law judge considered the opinions of Drs. Crouch, Ghio, Hudgens, Javed, and Roggli. Dr. Javed, who is Board-certified in Internal Medicine and Cardiovascular Disease and who was the miner's treating physician, opined that the miner died of respiratory failure due to "end-stage Pneumoconiosis." Claimant's Exhibit 3. Drs. Crouch and Roggli opined that the miner's simple pneumoconiosis was too mild to have caused or hastened his death. Employer's Exhibits 1, 2, 8. Dr. Ghio, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the evidence of record and opined that the miner's death was unrelated to pneumoconiosis, but resulted from respiratory failure due to severe chronic obstructive pulmonary disease caused by smoking. Employer's Exhibits 3, 6. Dr. Hudgens did not address whether pneumoconiosis caused or hastened the miner's death. Director's Exhibit 11.

[5] The administrative law judge relied on the testimony of Dr. Ghio that Drs. Crouch and Roggli are nationally and internationally recognized experts in Pulmonary Pathology. Employer's Exhibit 6 at 19.

Although the administrative law judge found that Dr. Javed's opinion was well-reasoned, he permissibly found that the contrary opinions of Drs. Crouch and Ghio were "very well documented and very well reasoned," *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997), and further, he permissibly found "the qualifications of Drs. Roggli, Crouch and Ghio to be superior to those of Dr. Javed."[6] Decision and Order at 17-18; *see Hicks*, 138 F.3d at 536, 21 BLR at 2-341. Claimant's assertion that the administrative law judge should have credited the opinion of Dr. Javed because he was the miner's treating physician lacks merit. A treating physician's opinion need not be given greater weight than the opinion of other experts. *See* 20 C.F.R. §718.104(d)(5); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997). As substantial evidence supports the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the finding is affirmed.[7]

Because claimant did not establish entitlement to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 718.304, or otherwise establish that the miner's death was due to, or hastened by, pneumoconiosis, a necessary element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits.[8] *See Trumbo*, 17 BLR at 1-87.

[6] The record supports the administrative law judge's finding that "Dr. Ghio, as a pulmonary specialist, is trained to diagnose and treat pneumoconiosis. Dr. Javed[']s qualifications do not reflect that he has received the same training." Decision and Order at 18; Employer's Exhibit 6 at 13.

[7] Any error by the administrative law judge in failing to indicate the weight accorded to the miner's death certificate was harmless. The death certificate, listing "End Stage COPD/Pneumoconiosis" as a cause of death, was completed by Dr. Javed, whose narrative opinion the administrative law judge found to be outweighed by the contrary opinions of Drs. Crouch, Ghio, and Roggli. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibit 8.

[8] For the reasons given in the Board's order of December 4, 2007, we reject employer's argument that the Board lacks jurisdiction to consider claimant's appeal. *See* 20 C.F.R. §§802.205(a); 802.207(b); [*J.M.*] *v. Garden Creek Pocahontas*, BRB No. 08-192 BLA (Dec. 4, 2007)(unpub. Order).

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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JUDITH S. BOGGS
Administrative Appeals Judge