

BRB Nos. 09-0195 BLA  
and 09-0823 BLA

S.J.S. )  
(Widow of and On Behalf of C.S.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
ROCK GAP COAL COMPANY )  
 ) DATE ISSUED: 09/17/2009  
and )  
 )  
AMERICAN RESOURCES 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Johanna F. Ellison (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a miner's claim (2006-BLA-06062) and a

survivor's claim<sup>1</sup> (2006-BLA-06061) 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 administrative law judge credited the miner with at least eighteen years of coal mine employment, based on a stipulation by the parties, 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 claimant failed to establish that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a). The administrative law judge further found that while claimant established that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), she failed to prove that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With respect to the survivor's claim, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis and, therefore, found that claimant was unable to prove 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 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). Claimant further asserts that the administrative law judge erred in finding that total disability was not established in the miner's claim pursuant to 20 C.F.R. §718.204(b)<sup>2</sup> and erred in failing to find that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging

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<sup>1</sup> Claimant is the widow of the miner. The miner filed a claim for black lung benefits on August 28, 2003. Director's Exhibit 2. While his claim was pending, the miner died on June 23, 2005. Director's Exhibit 95. Subsequently, claimant filed a survivor's claim for benefits on August 24, 2005. Director's Exhibit 89. Following findings of entitlement by the district director on both claims, employer requested a formal hearing. Both the miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges, where they were consolidated. Administrative Law Judge Thomas F. Phalen, Jr., conducted a formal hearing on April 10, 2007. By Decision and Order dated October 20, 2008, the administrative law judge denied both claims. Claimant appealed to the Board, contesting the denial of benefits in both the miner's claim and the survivor's claim. By letter dated December 11, 2008, the Board, inadvertently, only acknowledged the appeal of the survivor's claim, BRB No. 09-0195 BLA. By Order dated September 14, 2009, the Board acknowledged the appeal of the miner's claim, BRB No. 09-0823 BLA. These claims have been consolidated for decision.

<sup>2</sup> We note that although claimant cited to 20 C.F.R. §718.204(c), the provision pertaining to total disability is found at 20 C.F.R. §718.204(b).

affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.<sup>3</sup>

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.<sup>4</sup> 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).

In order to establish entitlement to benefits in a living miner's claim 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, 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); *Brown v. Rock Creek*

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<sup>3</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that the miner had at least eighteen years of coal mine employment and his findings 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), Decision and Order at 3, 13-14.

<sup>4</sup> Because the miner's coal mine employment was in Kentucky, 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 (1989) (*en banc*); Director's Exhibit 3.

*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. Since the administrative law judge rendered identical findings based on the same evidence in both claims, we will address the administrative law judge's findings in both the miner's and survivor's claims together.

Claimant asserts that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant contends that the administrative law judge erred in relying on the qualifications of the physicians and in placing substantial weight on the numerical superiority of the negative x-ray interpretations. Claimant's Brief at 3. Claimant also suggests that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 4. We reject claimant's assertions of error as they are without merit.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight readings of four x-rays dated September 26, 2003, December 5, 2003, December 19, 2003 and April 2, 2004, and considered the readers' radiological qualifications. Dr. Simpaio, with no known radiological qualifications, and Dr. Alexander, a Board-certified radiologist and B reader, interpreted the September 26, 2003 x-ray as positive for pneumoconiosis, while Dr. Spitz, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis.<sup>5</sup> Director's Exhibits 9, 16, 64. Dr. Fino, a B reader, interpreted the December 5, 2003 x-ray as negative for pneumoconiosis. Director's Exhibits 12, 105.<sup>6</sup> Dr. Alexander interpreted the December 19, 2003 x-ray as positive for pneumoconiosis, while Dr. Broudy, a B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibits 11, 16, 105. Dr. Baker, a B reader, interpreted the April 2, 2004 x-ray as positive for pneumoconiosis, while Dr. Spitz interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibits 15, 70.

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<sup>5</sup> Dr. Barrett, a Board-certified radiologist and B reader, reviewed the September 26, 2003 x-ray for its film quality only. Director's Exhibit 10.

<sup>6</sup> In the miner's claim, medical reports as well as their accompanying testing results by Drs. Broudy and Fino are designated as Director's Exhibits 11 and 12, respectively. The same medical reports were also admitted into the record in the survivor's claim and are both included in a single exhibit, designated as Director's Exhibit 105.

After noting that the radiological qualifications of Drs. Alexander and Spitz were superior to those of Dr. Simpao, the administrative law judge found that Dr. Simpao's x-ray reading was entitled to little weight and that, in light of the conflicting x-ray readings by equally qualified radiologists, the September 26, 2003 x-ray neither precluded nor established the presence of pneumoconiosis. Decision and Order at 12. The administrative law judge found that the December 5, 2003 x-ray was negative for pneumoconiosis in light of the sole reading by Dr. Fino. Decision and Order at 13. After noting that the radiological qualifications of Dr. Alexander were superior to those of Dr. Broudy, the administrative law judge found that the December 19, 2003 x-ray was positive for pneumoconiosis. *Id.* Upon finding the radiological qualifications of Dr. Spitz to be superior to those of Dr. Baker, the administrative law judge determined that the April 2, 2004 x-ray was negative for pneumoconiosis. *Id.*

The administrative law judge found that, analyzed individually, "one of the x-rays neither precludes nor establishes pneumoconiosis; one of the x-rays is positive for pneumoconiosis; and two x-rays are negative for pneumoconiosis." *Id.* The administrative law judge further found that, analyzed together, the x-ray evidence was "inconclusive" since four x-ray readings were positive for pneumoconiosis and four were negative for pneumoconiosis. *Id.* Finally, the administrative law judge stated that:

Of the four positive interpretations, three were rendered by B-readers. Moreover, two of the positive interpretations were made by Dr. Alexander, a dual-qualified B-reader and Board-certified radiologist. Of the four negative interpretations, all four were rendered by B-readers. Furthermore, two of the negative interpretations were made by Dr. Spitz, a dual-qualified B-reader and Board-certified radiologist. Accordingly, a slight majority of the B-readings are negative for pneumoconiosis; and, the conflicting interpretations by dual-qualified [sic] B-readers and Board-certified radiologists are in equipoise.

*Id.* 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, noting that "[a]t best, the x-ray evidence neither precludes nor establishes the presence of pneumoconiosis." *Id.*

Claimant argues that the administrative law judge improperly relied on the readers' credentials, that he erred in deferring to the numerical superiority of the negative readings, and that he selectively analyzed the x-ray evidence. We disagree. Contrary to claimant's contention, the administrative law judge based his finding, that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, on a rational, qualitative and quantitative analysis of the x-ray evidence. *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). Therefore, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical report of Dr. Simpao, the medical reports and deposition testimonies of Drs. Fino and Broudy, the miner's treatment records and his death certificate.<sup>7</sup> Decision and Order at 14-15; Director's Exhibits 9, 11, 12, 87, 95, 103, 104, 105; Claimant's Exhibit 1; Employer's Exhibits 1, 2. Dr. Simpao diagnosed "CWP 1/0" and stated that "multiple years of coal dust exposure [were] medically significant in [the miner's] pulmonary impairment." Director's Exhibit 9. The administrative law judge, however, found that "Dr. Simpao did not provide a rationale for this conclusion. Decision and Order at 7. By contrast, Drs. Fino and Broudy, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, opined that the miner did not have pneumoconiosis. Decision and Order at 7, 8, 14; Director's Exhibits 11, 12, 105. The administrative law judge discounted the diagnosis of pneumoconiosis by Dr. Simpao, as not well-reasoned or well-documented, because Dr. Simpao had relied solely on a positive x-ray reading and the miner's coal dust exposure history. Decision and Order at 15. By contrast, the administrative law judge found the opinions of Drs. Fino and Broudy, that the miner did not have pneumoconiosis, to be better reasoned and documented. *Id.* Further, he found that their opinions merited greater weight based on their superior qualifications.<sup>8</sup> *Id.* He therefore found that Dr. Simpao's opinion was outweighed by the opinions of Drs. Fino and Broudy. *Id.*

Claimant contends that the administrative law judge erred in rejecting Dr. Simpao's opinion as based on a positive x-ray reading that was "contrary to the [administrative law judge's] findings." Claimant's Brief at 4. In addition, claimant argues that Dr. Simpao's opinion was well-reasoned and should not have been rejected. Claimant's contentions are without merit. Claimant essentially requests a reweighing of the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR at 1-113. Contrary to claimant's contention, the administrative law judge reasonably found that Dr. Simpao failed to explain how the documentation underlying his report supported his diagnosis. *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 at 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge acted within

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<sup>7</sup> Dr. Gharib prepared the miner's death certificate and identified the cause of death as "Chronic Obstructive Pulmonary Disease." Director's Exhibit 95.

<sup>8</sup> The administrative law judge found that although Dr. Simpao has "some pulmonary experience, he is not a Board-certified pulmonary specialist." Decision and Order at 14.

his discretion in according little weight to the opinion of Dr. Simpao because he did not offer a well-reasoned explanation as to how his observations supported a finding of pneumoconiosis or provide a well-documented opinion for his diagnosis that the miner had pneumoconiosis. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR 1-22; Decision and Order at 15. We affirm, as supported by substantial evidence, the administrative law judge's determination to accord less weight to Dr. Simpao's opinion and greater weight to the contrary opinions of Drs. Fino and Broudy, which he found were more reasoned and were by physicians who possessed superior qualifications.<sup>9</sup> See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Moreover, it is within the purview of the administrative law judge to weigh the medical evidence, draw inferences therefrom, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark*, 12 BLR at 1-151. The administrative law judge has discretion to resolve the conflicting evidence and is given deference with regard to credibility determinations. See *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); see *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. 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,"<sup>10</sup> *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, 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 was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, we affirm the administrative law judge's finding that claimant failed to establish that the miner suffered from pneumoconiosis at 20 C.F.R.

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<sup>9</sup> We reject claimant's assertion that the administrative law judge "appears to have" substituted his opinion for that of a medical expert, in the absence of any supporting evidence for this assertion. Claimant's Brief at 5.

<sup>10</sup> The administrative law judge stated that he had "conducted a qualitative assessment of the medical opinions by analyzing the credibility of each medical opinion considered as a whole, in light of that physician's credentials, documentation, and reasoning." Decision and Order at 14.

§718.202(a)(4), as it is supported by substantial evidence. We further affirm the administrative law judge's finding that the miner did not have pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Claimant also asserts that the administrative law judge erred in failing to find that the miner was totally disabled. Claimant's Brief at 6. Contrary to claimant's assertion, the administrative law judge, upon reviewing the medical evidence, like and unlike, found that, "despite the nonqualifying arterial blood gas studies, the qualifying pulmonary function studies and medical opinion evidence establish that the [m]iner was totally disabled pursuant to [20 C.F.R.] §718.204(b)." Decision and Order at 17. Consequently, claimant's arguments with respect to this issue are moot.

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in the miner's claim under 20 C.F.R. Part 718, we affirm the denial of benefits in the miner's claim. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

With regard to the survivor's claim, the administrative law judge concurrently applied the credibility findings he made in the miner's claim with respect to the x-ray and medical opinion evidence that was also in the record in the survivor's claim. For the reasons set forth in our consideration of claimant's appeal of the denial of benefits in the miner's claim, we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) by a preponderance of the evidence in the survivor's claim.

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we also affirm the administrative law judge's denial of benefits in the survivor's claim. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge in the miner's claim and the survivor's claim 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