BRB No. 11-0176 BLA

SUSIE M. WILLIAMS (Widow of JEFFREY A. WILLIAMS) Claimant-Petitioner v. KESSLER COALS, INCORPORATED WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/08/2011 DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Susie M. Williams, Whitesville, West Virginia, *pro se*.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order (2006-BLA-05453) of Administrative Law Judge Janice K. Bullard (the administrative law judge) on a survivor's claim filed on May 6, 2005, 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*))(the Act). The administrative law judge found that claimant established that the miner had 13.27 years of coal mine employment, but that the evidence failed to establish that he had pneumoconiosis or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205(c). Further, the administrative law judge found that, because the miner had fewer than fifteen years of coal mine employment, claimant was not entitled to the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.[3] *See* 30 U.S.C. §921(c)(4). Accordingly, benefits were denied.

On appeal, claimant contends generally that she is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in response to the appeal.

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are

[1] Claimant is the widow of the miner, who died on April 22, 2005. Director's Exhibit 11. There is no evidence in the record that the miner filed a lifetime claim for benefits.

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

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010 were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner has at least fifteen years of qualifying coal mine employment, and has a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

rational, and are consistent with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (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).

Section 411(c)(4) – Length of Coal Mine Employment

The administrative law judge found that the Section 411(c)(4) presumption was not invoked, because the miner did not have fifteen years of coal mine employment. The administrative law judge noted that the Director calculated that the miner had 13.27 years of coal mine employment. Director's Exhibit 6. In reviewing the evidence, the administrative law judge noted that the West Virginia Workers' Compensation Board credited the miner with twenty years of coal mine employment. The administrative law judge, however, found that she was not bound by the state agency's determination, and that there was nothing in the record before her that supported the state agency's determination. *See Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41 (1994); Decision and Order at 13. Instead, the administrative law judge reasonably found that only 13.27 years of coal mine employment were established, based on the miner's Social Security records. *See Schmidt v. Amax Coal Co.*, 7 BLR 1-489 (1984). The administrative law judge properly found that claimant's testimony, that her husband had greater than twenty years of coal mine employment, was not credible as it was "too vague

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 4, 6.

and non-specific . . . to amount to substantial evidence."[5] Decision and Order at 13; Hr. Tr. at 19. Accordingly, we affirm the administrative law judge's reliance on the miner's Social Security records to find that only 13.27 years of coal mine employment were established. *See Schmidt*, 7 BLR at 1-491. Further, because fewer than fifteen years of coal mine employment were established, the administrative law judge properly found that claimant was not entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Section 718.202 – Pneumoconiosis

Turning to Section 718.202(a)(1), the administrative law judge found that the x-ray evidence consisted of four interpretations of the October 2, 1996 x-ray by four dually-qualified readers. Two interpretations were positive for pneumoconiosis, and two were negative for pneumoconiosis. Claimant's Exhibits 1, 2; Employer's Exhibits 15, 16. The administrative law judge, therefore, properly found the x-ray evidence to be in equipoise and insufficient to establish pneumoconiosis at Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Additionally, the administrative law judge noted that the miner's 2005 treatment records contained a positive reading of the October 2, 1996 x-ray by Dr. Bassali, a dually-qualified reader. Claimant's Exhibit 3; Decision and Order at 4. The administrative law judge, however, properly found that this reading did not establish pneumoconiosis because it was not found by any treating physician to support a diagnosis of pneumoconiosis. The administrative law judge also properly found that it was unreliable because it was inconsistent with more recent CT scans, included in the miner's treatment records, which found lung cancer, but not pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence did not establish pneumoconiosis pursuant to Section 718.202(a)(1).

Next, the administrative law judge considered the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge noted that Dr. Caffrey found that the cytopathology report he reviewed was inadequate to either confirm or deny the presence of coal workers' pneumoconiosis. Decision and Order at 5; Employer's Exhibit

[5] At the hearing, claimant testified that her deceased husband had been "a coal miner," that he worked "inside the mines…for Kessler Coal," and that "he drove a coal truck for Union Coal Mines." Hr. Tr. at 18-19. Although she alleged that the miner had over twenty years of coal mine employment, she never referred to any specific dates or time periods that he was employed. Hr. Tr. at 19.

10. We, therefore, affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(2). *See Ondecko*, 512 U.S. at 281; 18 BLR at 2A-12. We also affirm the administrative law judge's finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(3), as none of the presumptions referred to therein are available in this case. *See* 20 C.F.R. §§718.304, 718.305, 718.306. We, therefore, affirm the administrative law judge's finding that claimant did not establish pneumoconiosis pursuant to Section 718.202(a)(3).

Finally, the administrative law judge considered the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge properly credited the opinions of Drs. Jarboe and Ghio, that the record fails to establish clinical pneumoconiosis, because they were supported by the miner's x-ray, CT scan, and treatment record evidence. *See Compton*, 211 F.3d at 213, 22 BLR 2-172; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-14 (1989)(*en banc*). The administrative law judge properly found that the medical opinion evidence did not establish legal pneumoconiosis because Dr. Ghio did not reach a conclusive opinion as to whether claimant's chronic obstructive pulmonary disease (COPD) was related to coal mine employment and Dr. Jarboe attributed the disease to smoking, and not coal mine employment. *See* 20 C.F.R. §718.201; Employer's Exhibits 3, 4, 5, 13, 18, 19; Decision and Order at 17. The administrative law judge also properly found that the miner's treatment records did not establish legal pneumoconiosis, as they attributed the miner's COPD to smoking, and not coal mine employment. *See* 20 C.F.R. §718.201; Decision and Order at 17. Accordingly, the administrative law judge's finding that neither clinical nor legal pneumoconiosis was established pursuant to Section 718.202(a)(4) is affirmed.

In conclusion, the administrative law judge properly found that the pneumoconiosis was not established pursuant to Section 718.202(a). As claimant failed to establish pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we need not consider the administrative law judge's finding pursuant to Section 718.205(c). *See Trumbo*, 17 BLR at 1-88.

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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BETTY JEAN HALL
Administrative Appeals Judge