

BRB No. 97-0772 BLA

PATTY L. COOK)
(For the Estate of and Widow of WILLIAM D.)
COOK))

Claimant-Petitioner)

v.)

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

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Patty Cook, Hellier, Kentucky, *pro se*.

Richard A. Seid (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (96-BLA-0342) of Administrative Law Judge Thomas M. Burke denying benefits on claims 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 administrative law judge credited the miner with two and one-half years of coal mine employment. In reaching this figure, the administrative law judge rejected the written statements of the miner's co-workers and claimant's testimony regarding the miner's employment. The administrative law judge then

¹ Claimant is Patty L. Cook, who filed her application for survivor's benefits on October 20, 1994. Director's Exhibit 2. William D. Cook, the miner, filed his claim on November 1, 1993 which was pending at the time of his death on September 5, 1994. Director's Exhibits 1, 10.

concluded that the medical evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In so doing, the administrative law judge relied on his finding of two and one-half years of coal mine employment to discredit the opinion of a physician who relied on a longer coal mine employment history to diagnose pneumoconiosis.² Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging affirmance of the denial of the survivor's claim, but urging the Board to vacate the denial of the miner's claim and to remand the case for reconsideration of the length of coal mine employment evidence and of the medical opinions regarding the existence of pneumoconiosis.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment, and a survivor must prove by a preponderance of the evidence that the miner's death was due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

We affirm the administrative law judge's finding pursuant to Section 718.202(a)(1). The record contains sixteen readings of twelve x-rays. There is one positive reading of the February 21, 1994 x-ray by Dr. Mettu, who lacks radiological credentials. Director's Exhibit 16. The same x-ray was read negative by three Board-certified radiologists and B-readers. Director's Exhibits 19, 20, 22. All of the remaining x-rays were either negative, unreadable, or were not classified for the presence or absence of pneumoconiosis. Director's Exhibits 13, 33, 34. The administrative law judge weighed all of the x-rays in light of the physicians' radiological qualifications and permissibly found that a "clear preponderance of the x-ray evidence is negative for pneumoconiosis." Decision and Order at 4-5; see *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Therefore, we affirm the

² Dr. Mettu relied on a history of approximately ten years of coal mine employment. Director's Exhibit 16.

administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy or autopsy evidence, and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis and the miner died after March 1, 1978. Decision and Order at 3; see 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

We agree with the Director's contention that the administrative law judge's finding of two and one-half years of coal mine employment is too cursory to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); see also *Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984). Director's Motion at 3-4. Claimant and the miner alleged approximately eight to ten years of coal mine employment. Director's Exhibits 1, 2. The relevant evidence consisted of the written history provided by the miner, the miner's Social Security earnings records, the co-workers' statements, and claimant's testimony. Director's Exhibits 1, 3, 4, 5, 7; Hearing Transcript at 8-17. The administrative law judge stated that the Social Security records were "the only creditable evidence of coal mine employment," and found that they indicated ten quarters of coal mine employment. Decision and Order at 3. In so doing, he summarily rejected the co-workers' statements, stating without explanation, "they don't add any additional time." *Id.* Without addressing any specific portion of claimant's hearing testimony, the administrative law judge rejected it as "vague" and not based on personal knowledge of the miner's employment prior to 1957. *Id.*

Statements by co-workers and a claimant's testimony may constitute substantial evidence of coal mine employment. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *Hutnick v. Director, OWCP*, 7 BLR 1-326 (1984). An administrative law judge must explicitly consider such evidence and state the reason for crediting or discrediting specific pieces of evidence. *Shapell v. Director, OWCP*, 7 BLR 1-304, 1-308 (1984). Without such an explanation, it is not clear why he found that the co-workers' statements do not support a finding of additional coal mine employment. Review of the record indicates that they are consistent with the history provided by the miner and with the Social Security records, and some statements are specific enough, if credited, to fill gaps in the Social Security records.³ Director's Exhibit 5. These statements are sufficient, if credited, to add two and one-half to three and one-half years of employment, for a total of five and one-half to seven years of coal mine

³ Specifically, Arvil Hopson's statement records employment with Birchfield Coal Company from 1954 to 1956, that of James C. Bartley notes employment at D.H. Clark's tipple from 1950 to 1952, and that of Johnnie Childers indicates two years of employment with Childers Coal Company in 1958 and 1959. Director's Exhibit 5.

employment. Seven years of coal mine employment may not be significantly less than the ten years relied on by Dr. Mettu. Director's Exhibit 16; See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). In addition, although claimant's testimony is not as specific as some of the co-workers' statements, it is consistent with them regarding certain facts,⁴ and claimant did state specifically that the miner was working in a coal mine when they met in 1957 and continued to work there until 1960. Hearing Transcript at 15-16. Because the administrative law judge did not explain adequately his reason for rejecting these items of evidence, we must vacate his length of coal mine employment finding and remand the case for him to reconsider the relevant evidence, indicate the weight assigned thereto, and explain his analysis. We also vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and instruct him to reweigh the medical opinions if he credits the miner with more coal mine employment than he previously found established. He should then go on to consider whether claimant has established that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b) and (c).

Finally, entitlement on the survivor's claim is precluded because the record contains no evidence of death due to pneumoconiosis pursuant to Section 718.205(c), a necessary element of entitlement.⁵ See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Therefore, we affirm the denial of benefits on the survivor's claim.

⁴ For example, claimant testified that she believed that the miner began working in the mines at approximately age fifteen. Hearing Transcript at 9. James C. Bartley stated that the miner "would have been about sixteen years old at the time" that he worked for D.H. Clark. Director's Exhibit 5.

⁵ The death certificate lists the sole cause of death as esophageal cancer. Director's Exhibit 10. Dr. Broudy concluded that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 15; see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Review of the record reveals no further evidence on this issue.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed on the survivor's claim and is affirmed in part and vacated in part on the miner's claim, and that case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge