

BRB No. 00-1155 BLA

MADELINE RATLIFF)
(Widow of SILAS RATLIFF))
)
Claimant-Petitioner)
)
v.)
)
JOHNSON BROTHERS COAL COMPANY,) DATE ISSUED:
)
INCORPORATED)
)
and)
)
KENTUCKY COAL PRODUCERS SELF)
INSURANCE FUND))
)
Primary Employer/Carrier-)
Respondent)
)
CHAPPERAL COAL CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Secondary Employer/Carrier)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Dismissing Chapperal Coal Corporation and Its Carrier Old Republic Insurance Company and Denying Benefits of Joseph E. Kane, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

David H. Neeley (Neeley & Reynolds, P.S.C.), Prestonsburg, Kentucky, for

primary employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Dismissing Chapperal Coal Corporation and its Carrier Old Republic Insurance Company and Denying Benefits (00-BLA-0314) of Administrative Law Judge Joseph E. Kane 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).¹ The administrative law judge found that the evidence of record supported a finding of eighteen years of coal mine employment. Decision and Order at 3-4. The administrative law judge further found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000). Decision and Order at 5-16. Accordingly, the administrative law judge denied survivor's benefits.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). As a result of the court's decision, we will not address any briefs submitted to the Board by the parties on this issue.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), (4)(2000).² Claimant further asserts that the evidence of record establishes that pneumoconiosis was a substantial, contributing cause of the miner's death. Employer responds and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner has pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *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). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hasten's the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

² We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as well as the determination that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2), (3)(2000). *See* 20 C.F.R. §718.202(a)(2), (3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On appeal, claimant contends that the positive x-ray interpretations of Drs. Penman and Anderson, Director's Exhibit 47, support a finding of the existence of pneumoconiosis. In finding that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence, the administrative law judge considered the entirety of x-ray evidence of record and found that, while the readings of both Drs. Penman and Anderson were positive for the existence of the disease, the weight of the x-ray evidence as a whole failed to support a finding of the existence of pneumoconiosis. Decision and Order at 14-15. In reaching this determination, the administrative law judge specifically concluded that the weight of the readings by the physicians with the superior qualifications of B-reader and/or board-certified radiologist,³ were negative for the existence of pneumoconiosis. Accordingly, inasmuch as the administrative law judge has considered the entirety of the relevant x-ray evidence of record and has relied on a qualitative rather than quantitative analysis of such evidence, we affirm his determination that claimant has failed to establish that the existence of pneumoconiosis by x-ray evidence. 20 C.F.R. §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); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Claimant further contends that the medical opinions of Dr. Younes, who concluded that the miner suffered from COPD attributable, in part, to coal dust exposure, Director's Exhibit 46, and Dr. Mettu, who concluded that the miner suffered from pneumoconiosis, Director's Exhibits 7, 23, 25, 30, support a finding of the existence of pneumoconiosis. The administrative law judge considered the reports and permissibly accorded little weight to Dr. Younes' opinion as the physician failed to provide any support for his conclusions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). In addition, the administrative law judge permissibly accorded little weight to Dr. Mettu's conclusions inasmuch as the physician failed to provide any support for his conclusions, *see Clark, supra*; *York, supra*; *Oggero,*

³ A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A "board-certified radiologist" is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology.

supra; *Cooper, supra*, and failed to take into account claimant's lengthy smoking history, *see generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). The administrative law judge thus permissibly found that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence. *See Clark, supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, the administrative law judge has provided valid bases for the weight accorded the medical opinion evidence, *see Clark, supra*; *Peskie, supra*; *Lucostic, supra* and substantial evidence supports his determination that it fails to establish the existence of pneumoconiosis.

Because claimant has failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim, we must affirm the denial of benefits, and need not consider claimant's contention that death due to pneumoconiosis has been established. *Brown, supra*; *Trumbo, supra*.

Accordingly, the administrative law judge's Decision and Order - Dismissing Chapperal Coal Corporation and its Carrier Old Republic Insurance Company and Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge