BRB No. 05-0446 BLA

NORMA J. FULFORD (Widow of ROBERT E. FULFORD) Claimant-Petitioner v. PEABODY COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/24/2006 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Norma J. Fulford, Jasonville, Indiana, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order -

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[1]Claimant is Norma J. Fulford, the widow of Robert E. Fulford, the miner. Claimant filed her survivor's claim for benefits on December 23, 2002. Director's Exhibit 2. The miner's first claim for benefits, filed on July 24, 1986, was finally denied on October 22, 1986. Director's Exhibit 1. The miner's second claim, filed on December 28, 1990, was finally denied on May 31, 1991. *Id.* The miner died on April 23, 2002. Director's Exhibit 8.

Denial of Benefits (04-BLA-5577) of Administrative Law Judge Robert L. Hillyard 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 administrative law judge credited the miner with twenty-four years of coal mine employment. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* at 10-16. The administrative law judge also found that because claimant failed to establish the existence of pneumoconiosis, she could not establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by the Act, 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 pursuant to 20 C.F.R. Part 718, 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

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[2]Claimant was unrepresented by counsel before the administrative law judge. The administrative law judge confirmed that claimant had been unable to secure counsel and wished to proceed without counsel. He identified the issues in this case and gave claimant the opportunity to object to, and admit evidence, and to testify at the hearing. Hearing Transcript at 6-7, 11-22. Therefore, we hold that the hearing was properly conducted. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

[3]We affirm the administrative law judge's finding that the miner had twenty-four years of coal mine employment because this finding is not adverse to claimant and is unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis. *See* 20 C.F.R. §§718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-87-88 (1993).

Pursuant to 20 C.F.R. §718.202(a)(1), the x-ray evidence consists of four readings of three x-rays dated April 2, 2002, May 28, 1999, and September 9, 1986. The administrative law judge noted that three of the four x-ray interpretations were negative for the existence of pneumoconiosis and that one was positive and that all of the readings were rendered by physicians who are B-readers[4] and Board-certified radiologists. Decision and Order at 11. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) by according "greater weight to the three negative interpretations by dually certified physicians, both because they are many years more recent [than the one positive x-ray reading] and because of their numerical superiority." *Id.* Because substantial evidence supports the administrative law judge's finding that the x-ray evidence is negative for pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence. *See Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

The administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because the record does not contain any biopsy or autopsy evidence. *Id*. Moreover, since there is no evidence of complicated pneumoconiosis and the instant case involves a survivor's claim filed on December 23, 2002, the administrative law judge properly determined that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305(e), 718.306. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2), (a)(3).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinion evidence. Regarding the evidence relevant to the existence of

[4]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 given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. 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).

pneumoconiosis,[5] the administrative law judge noted that Dr. Pagnan, who examined the miner in 1986, "found no abnormalities consistent with pneumoconiosis and made no diagnoses compatible with legal pneumoconiosis" and that Dr. Combs, who examined the miner in 1991, "opined that the Miner suffered from pulmonary fibrosis due in part to coal dust exposure." Decision and Order at 12-13. The administrative law judge stated that Dr. Theertham, the miner's treating physician, found chronic obstructive pulmonary disease, interstitial fibrosis, a history of coal miner's disease, and questionable black lung, but this physician did not connect any of the miner's pulmonary diagnoses to coal mine employment. *Id.* at 15. The administrative law judge further stated that Drs. Renn and Tuteur, who are consulting physicians, found no evidence of pneumoconiosis. *Id.* at 13-14. Additionally, the administrative law judge noted that "[t]he record contains nearly 900 pages of hospitalization and treatment notes" in which there is no diagnosis of coal workers' pneumoconiosis. *Id.* at 15.

The administrative law judge accorded little weight to the 1986 report of Dr. Pagnan and the 1991 report of Dr. Combs because of the age of these reports and because the record does not contain these physicians' qualifications. Decision and Order at 13. Moreover, the administrative law judge found that Dr. Combs' report did not constitute a reasoned medical opinion pursuant to Section 718.202(a)(4) because he found it to be based solely on an x-ray reading and the miner's coal dust exposure history and he found that this physician failed to "explain how the miner's duration of coal mine employment supports his diagnosis" of pneumoconiosis. *Id.* After considering Dr. Theertham's status as the miner's treating physician, the administrative law judge accorded less weight to this physician's opinion because he found it to be equivocal and undocumented. *Id.* at 14-15. Additionally, the administrative law judge noted Dr. Theertham's "lack of specialty credentials." *Id.* at 15. Conversely, the administrative law judge accorded "substantial weight" to the opinions of Drs. Renn and Tuteur, based on these physicians' superior credentials[6] and because he found their opinions to be well documented. *Id.* at 13-14. Further, the administrative law judge considered the CT scan interpretations of Drs. Wiot, Shipley, Meyer, and Zancanaro. *Id.* at 15. The administrative law judge found these physicians' negative CT scan interpretations corroborate the opinions of Drs. Renn and Tuteur, that the miner did not suffer from pneumoconiosis. *Id.* at 16.

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[5]The record also contains a death certificate which lists the cause of death as non-small cell lung cancer with liver and bone metastasis. Director's Exhibit 8.

[6]The record reveals that Dr. Renn is Board-certified in Internal Medicine, Pulmonary Disease, and Forensic Medicine and is a B-reader. Employer's Exhibit 1. Dr. Tuteur is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 7. The record does not contain the qualifications of Drs. Pagnan, Combs, and Theertham.

Accordingly, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[7] *Id.*

We hold that the administrative law judge permissibly accorded less weight to the opinion of Dr. Theertham, the miner's treating physician, because he rationally found it to be equivocal and undocumented. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *see Church v. Eastern Assoc. Coal Corp.*, 21 BLR 1-51, 1-56 (1997), *rev'g in part and aff'g in part on recon.*, 20 BLR 1-8 (1996); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, we hold that the administrative law judge properly accorded less weight to Dr. Combs' opinion because he rationally found it to be unreasoned. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met her burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Because we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, we further affirm the administrative law

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[7]We note that in considering this survivor's claim, filed in 2002, the administrative law judge considered all the evidence from the miner's prior claims. Such an inclusion is not automatically available in a survivor's claim filed pursuant to the revised regulations. Rather, the medical evidence from the living miner's prior claims must have been designated as evidence by one of the parties in order for it to have been included in the record relevant to the survivors' claim. Because claimant has not produced any new medical evidence sufficient to support her burden of establishing the existence of pneumoconiosis at Section 718.202(a), we deem harmless any error the administrative law judge may have made in considering this prior evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

judge's denial of benefits in this survivor's claim. *Trent*, 11 BLR at 1-27; *Perry,* 9 BLR at 1-2; *Trumbo*, 17 BLR at 1-87-88.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge