BRB Nos. 11-0675 BLA
and 11-0676 BLA

PATSY MCDOWELL (O/B/O of the Estate of and as Widow of RONALD MCDOWELL) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 06/22/2012 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Patsy McDowell, Burnside, Kentucky, *pro se*.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2009-BLA-05746 and 2009-BLA-05747) of Administrative Law Judge Christine L. Kirby on both a miner's and a survivor's claim filed on December 4, 2003 and September 24, 2007, respectively,[1] 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

[1] The miner died on January 18, 2007, while his claim was pending. The claims have been consolidated. *See* Director's Exhibit 64.

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 7.37 years of coal mine employment. Considering the miner's claim, the administrative law judge found that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement. Turning to the survivor's claim, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis and that claimant's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205(c), respectively. Accordingly, the administrative law judge denied benefits on both the miner's and the survivor's claims.

On appeal, claimant generally challenges the administrative law judge's findings and the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits in both the miner's and the survivor's claims.

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 Corp.*, 12 BLR 1-176, 1-177 (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.[2] 33 U.S.C. §921(b)(3), as incorporated 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 this miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For

[2] Because the miner's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

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, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that 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); *see Brown v. Rock Creek Coal Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Years of Coal Mine Employment

Considering the length of the miner's coal mine employment, the administrative law judge noted that the miner, in a 2004 letter, alleged that he had eleven years of coal mine employment between 1958 and 1984. Director's Exhibit 31, p. 43. The Director has conceded that the miner had five years of coal mine employment. *See* Decision and Order at 6; Hearing Transcript at 7.

Claimant bears the burden of establishing the length of coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the Act does not provide any specific guidelines for the computation of years of coal mine employment, the Board will uphold an administrative law judge's determination if it is based on a reasonable method of computation and is supported by substantial evidence. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). An administrative law judge may credit Social Security Earnings records over claimant's testimony where the testimony is unreliable. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984).

In this case, the administrative law judge "conduct[ed] a year-by-year analysis of the [m]iner's coal mine employment." Decision and Order at 4, 6-12. In evaluating the years of coal mine employment reported by the miner on his History of Coal Mine Employment Form-CM-911a, Director's Exhibit 3, the administrative law judge discounted many periods of listed coal mine employment as he found that the miner and claimant failed to provide any documentation or verification of the listed coal mine employment. *See* Decision and Order at 6-12; Director's Exhibit 15. Instead, the administrative law judge only credited the miner with periods of coal mine employment, listed on his History of Coal Mine Employment Form-CM-911(a), when they were supported by the miner's Social Security Administration Earnings record or were corroborated by affidavits from co-workers. The administrative law judge's finding, that only 7.37 years of coal mine employment were established, based on the miner's Social

Security Earnings record[3] and the corroboration of co-workers, is affirmed, as it was based on a reasonable method of computation and was supported by substantial evidence. *See Tackett*, 6 BLR at 1-841.

20 C.F.R. §718.202(a)
Pneumoconiosis

Considering whether the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge noted that the record contains conflicting interpretations of a single x-ray taken on March 12, 2004. Director's Exhibit 18. The administrative law judge noted that Dr. Baker read the x-ray as positive for pneumoconiosis, 1/0, Director's Exhibit 18, p. 1, while Dr. Kendall, a B reader and Board-certified radiologist, read the x-ray as negative for pneumoconiosis, Director's Exhibit 31, p. 21. Because Dr. Kendall is both a B reader and a Board-certified radiologist, while Dr. Baker is neither, the administrative law judge permissibly accorded greater weight to Dr. Kendall's negative x-ray reading and found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order at 15-16. Thus, we affirm the administrative law judge's finding that pneumoconiosis was not established by x-ray evidence pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2) and (3), the administrative law judge accurately determined that the record contains no autopsy or biopsy evidence, and that claimant is not entitled to the presumptions contained in Section 718.202(a)(3). Decision and Order at 19-20. Accordingly, we affirm the administrative law judge's finding that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3).

Turning to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Baker, Broudy and Rodrigues. Dr. Baker opined that the miner suffered from both clinical and legal pneumoconiosis, while Dr. Broudy opined that the miner did not have either clinical or legal pneumoconiosis. Dr. Rodrigues diagnosed "a severe,

[3] In addition to finding that the miner's alleged coal mine employment for Clifford McDowell was not reported on claimant's Social Security Administration Earnings record, the administrative law judge found that it would not constitute qualifying coal mine employment as it involved the transportation of coal to consumers, and was not integral to the extraction or preparation of coal. *See Swinney v. Director, OWCP*, 7 BLR 1-524 (1984).

chronic lung disease and [coal workers'] pneumoconiosis." Director's Exhibits 18, 21, 31, and 35.

In evaluating these opinions, the administrative law judge properly accorded less weight to the opinion of Dr. Baker because his diagnosis of clinical and legal pneumoconiosis was based on an inaccurate length of coal mine employment.[4] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)(en banc); Decision and Order at 21. Turning to the opinion of Dr. Rodrigues, the miner's treating pulmonary physician, the administrative law judge properly found that Dr. Rodrigues's diagnosis of "a severe, chronic lung disease" was insufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), as Dr. Rodrigues did not opine as to whether the miner's lung disease was due to coal mine employment. In addition, the administrative law judge properly found that Dr. Rodrigues's diagnosis of coal workers' pneumoconiosis was insufficient to establish clinical pneumoconiosis, as Dr. Rodrigues did not explain the basis of that diagnosis. *See* 20 C.F.R. §718.201; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 22. The administrative law judge, therefore, properly concluded that the medical opinion evidence did not establish the existence of either legal or clinical pneumoconiosis pursuant to Section 718.202(a)(4).

As we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established, an essential element of entitlement in both claims, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent*, 11 BLR at 1-27, claimant cannot prevail in either the miner's claim or the survivor's claim.

[4] Dr. Baker stated that his diagnoses of both clinical and legal pneumoconiosis were based on a coal mine employment history of twelve to fourteen years. Dr. Baker admitted, however, that if the miner had only five years of coal mine employment, as found by the district director, he would not have diagnosed either clinical or legal pneumoconiosis, but would have found that the miner's respiratory impairment was due to heart disease and smoking. Director's Exhibit 21.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in both the miner's and the survivor's claims is affirmed.[5]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5] The 2010 amendments do not apply in the miner's claim, as it was filed prior to January 1, 2005. The amendments do not apply in the survivor's claim as the miner did not have fifteen years of qualifying coal mine employment, 30 U.S.C. §921(c)(4), and the miner was not awarded benefits on his claim, 30 U.S.C. §932(*l*).