

BRB No. 02-0698 BLA

LAURA WOOD (Widow of)
FLOYD WOOD))
)
 Claimant-Petitioner))
)
 v.) DATE ISSUED:
)
 CLINCHFIELD COAL COMPANY)
)
 Employer-Respondent)
)
)
 DIRECTOR, OFFICE OF WORKERS'))
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Laura Wood, Clintwood, Virginia, *pro se*.

Timothy W. Gresham and J. Jasen Eige (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow,¹ without the assistance of legal counsel,²

¹ Claimant is Laura Wood, the surviving spouse of the deceased miner, Floyd Wood, who died on April 4, 1996. Decision and Order at 3; Director's Exhibits 99, 153.

² Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the

appeals the Decision and Order (2001-BLA-00237 and 2001-BLA-00238) of Administrative Law Judge Pamela Lakes Wood denying benefits and modification on a miner's duplicate claim and a survivor's claim 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).³ This miner's case has been before the Board previously.⁴ The miner, Floyd Wood, filed his original claim for black lung benefits on March 25, 1977, which was finally denied by Administrative Law Judge Robert J. Shea on August 25, 1988. The miner filed the instant claim on May 17, 1990, and subsequently, while the claim was pending on a remand from the Board, on June 26, 1995, sought modification. On April 14, 1996, while the claim was pending on the request for modification, the miner died. Decision and Order at 4. On September 21, 1999, the miner's widow, claimant herein, filed a survivor's claim, which was denied by the district director. Decision and Order at 3; Director's Exhibit 153.

administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

³ 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

⁴ In its most recent decision, the Board, noting that claimant had requested modification and a hearing, vacated the denial of benefits by Administrative Law Judge James W. Kerr, Jr., and remanded the case to the administrative law judge to consider the modification request, conduct a hearing and determine whether a survivor's claim was pending. *Wood v. Clinchfield Coal Co.*, BRB No. No. 98-0703 BLA (Feb. 11, 1999)(unpublished); Decision and Order at 4; Director's Exhibit 139. The remaining procedural history of this claim is set forth in prior decisions by the Board and the administrative law judges and is only briefly discussed herein.

Subsequently, on September 19, 2000, claimant requested modification of the denied survivor's claim, which was also denied. Both claims were consolidated and the case was referred to the Office of Administrative Law Judges.

The administrative law judge credited the miner with twenty years of coal mine employment and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. In considering modification with regard to both the miner's claim and the survivor's claim, the administrative law judge noted that, due to the complexity of the procedural history, none of the prior decisions had become final and, thus, consideration of modification in both cases would be impractical. Thus, the administrative law judge addressed both claims on the merits after a *de novo* review of the entire record. The administrative law judge considered all of the evidence of record and found that the evidence, while insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, was sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). She further found that claimant failed to establish that the miner's total disability and death were due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c) and 718.205(c). Accordingly, benefits were denied on both claims. On appeal, claimant generally contends that she is entitled to benefits. Employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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. *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 rational, are supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner's claim 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 of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

In order to establish entitlement to survivor's benefits, claimant must

demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that the miner's 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 survivors' 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 a 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 hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Initially we address the administrative law judge's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

The administrative law judge noted that there were conflicting opinions on whether complicated pneumoconiosis was present by x-ray and that Dr. Byers diagnosed complicated pneumoconiosis in his report in 1995 and 1996, while Dr. Ferguson did not identify complicated pneumoconiosis in his autopsy report. Decision and Order at 14-15. The administrative law judge also found that Drs. Caffrey, Tomaszewski, Crouch and Kleinerman, the reviewing pathologists, and Drs. Fino and Hippensteel, pulmonologists, all determined that the miner did not suffer

from complicated pneumoconiosis. *Id.* She noted both the difference of x-ray opinions on the presence of complicated pneumoconiosis and the absence of autopsy evidence of the disease. *Id.* The administrative law judge found that while Board-certified radiologists and B readers interpreted the miner's February 25, 1991, and February 27, 1991, x-rays as having large opacities or lesions of the type associated with complicated pneumoconiosis, equally qualified physicians found either no pneumoconiosis or only simple pneumoconiosis and that none of the x-rays taken subsequently were interpreted as showing evidence of complicated pneumoconiosis. *Id.* Moreover, the administrative law judge considered Dr. Byers's status as claimant's treating physician, but reasonably found that the diagnosis in his reports and on the death certificate was conclusory and thus outweighed by the contrary opinions. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 15. While the opinions of treating physicians may be entitled to greater weight than the opinions of non-treating physicians, the administrative law judge is not required to credit a treating physician's opinion if he finds that the opinion is not well reasoned. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner. Rather, the administrative law judge should also consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of complicated pneumoconiosis because the finding is supported by substantial evidence. 20 C.F.R. §718.304.

The administrative law judge further reasonably found that while claimant suffered from a totally disabling respiratory or pulmonary impairment at the time of his death, claimant failed to establish that the miner's pneumoconiosis contributed to his total disability. 20 C.F.R. §718.204(c); Decision and Order at 17-18. The administrative law judge noted that the opinions of Drs. Missak, Byers and Sargent did not address the cause of claimant's total respiratory disability or were premised upon the erroneous assumption that the miner had complicated pneumoconiosis and, furthermore, that Dr. Ferguson did not address the cause of claimant's total respiratory disability in his autopsy report. Decision and Order at 17. The administrative law judge, however, found that Drs. Caffrey, Tomashefski, Crouch and Kleinerman, the reviewing pathologists, and Drs. Fino and Hippensteel,

pulmonologists, all agreed that the miner's disabling pulmonary impairment was due to lung cancer and not pneumoconiosis. Decision and Order at 17-18; Director's Exhibits 101,110, 108-109, 111, 116, 118, 141-142; Employer's Exhibits 1-2.

In addition, the administrative law judge permissibly discounted the opinions of Drs. Robinette and Paranthaman, whose opinions were supportive of claimant's burden, because their conclusions were disputed by Drs. Sargent and Fino, whose opinions were better supported by the clinical data. *Hicks, supra*. Further, the administrative law judge found Drs. Robinette and Paranthaman, whose opinions were based on older evidence in the record in 1990 and 1992, did not review the more recent evidence demonstrating the presence of lung cancer. *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge therefore reasonably found that the medical opinions were insufficient to support a finding that claimant's total disability was due to pneumoconiosis, and this finding is affirmed. *Hicks, supra*; *Akers, supra*; *Dehue Coal Co. v. Ballard*, 65 F.3d, 1189, 19 BLR 2-304 (4th Cir. 1995)(Butzner, J., dissenting); *Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990); *Clark, supra*; *Wetzel, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Furthermore, the administrative law judge reasonably found that the preponderance of the more probative medical opinion evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge noted that only Dr. Byers concluded that the miner's pneumoconiosis played a role in his death. Decision and Order at 19. The administrative law judge, however, acted within his discretion in according diminished weight to the opinion of Dr. Byers regarding the cause of the miner's death because he found that the opinion was based on the erroneous conclusion that the miner suffered from complicated pneumoconiosis and was not well documented or reasoned. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996)(Williams, J., concurring); *Shuff, supra*; *Clark, supra*; *McMath, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 19.

Furthermore, the administrative law judge also acted within his discretion in crediting the opinions of Drs. Caffrey, Tomashefski, Crouch and Kleinerman, the reviewing pathologists, and Drs. Fino and Hippensteel, pulmonologists, that the miner's pneumoconiosis was too mild to have hastened or contributed in any way to

his death, as the administrative law judge found that these opinions were well-documented and well-reasoned. See *Wetzel, supra*; *Lucostic, supra*; Decision and Order at 19-20. The administrative law judge reasonably credited these opinions, that conclude the miner's death was due to his lung cancer, in light of the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. *Hicks, supra*; *Akers, supra*; *Clark, supra*; *Wetzel, supra*; *Lucostic supra*; Decision and Order at 19-20.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. See *Trent, supra*; *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff' d*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987).

Thus, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of complicated pneumoconiosis or that the miner's total disability or death was due to pneumoconiosis based on the more credible medical opinions by the physicians with superior qualifications. *Shuff, supra*; *Clark, supra*; *Fields, supra*. Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability due to pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to Sections 718.204(c), 718.304 and 718.205(c). Because claimant has not met her burden of proof on essential elements of entitlement in the miner's claim as well as the survivor's claim, we must affirm the denial of benefits in both claims. 20 C.F.R. §§718.204(c), 718.304, 718.205(c); see *Shuff, supra*; *Clark, supra*; *Trent, supra*; *Trumbo, supra*; *Neeley, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge