

BRB No. 08-0217 BLA

B.C.)	
(Widow of C.C.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 09/29/2008
JULIA TRUCKING, INCORPORATED)	
)	
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 Kenneth A. Krantz,
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Carl Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky for
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05739) of
Administrative Law Judge Kenneth A. Krantz rendered on a miner's claim and a
survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine

¹ B.C. is the widow of the miner, C.C., who died on February 2, 2003. The miner
first filed a claim for benefits on September 29, 1972, which was denied by the Social
Security Administration. Director's Exhibit 1. He filed a second claim on December 8,
1975, which was denied by the district director on January 16, 1981. *Id.* A third claim
was filed by the miner on February 10, 1994. *Id.* In a Decision and Order dated July 3,
1996, Administrative Law Judge Gerald M. Tierney denied benefits on the grounds that
the evidence was insufficient to establish total disability. *Id.* The denial was affirmed by

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge initially found that the district director erred in granting the miner's request to withdraw his June 16, 1989 claim in light of *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002). The administrative law judge determined that miner's application for benefits, filed on April 16, 2002, constituted a request for modification. Based on his consideration of the newly submitted evidence, the administrative law judge found that the miner was totally disabled and, thus, found that claimant had demonstrated a change in conditions pursuant to 20 C.F.R. §725.310 (2000).³ However, after weighing all of the record evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and denied benefits in the miner's claim. With respect to the survivor's claim, the administrative law

the Board. *Id.* Thereafter, the miner filed an untimely request for modification on July 24, 1998, which was denied by the district director. *Id.* He then filed a claim on June 16, 1999. *Id.* In a Decision and Order dated June 20, 2001, Administrative Law Judge Daniel J. Roketenetz denied benefits because the evidence was insufficient to establish the existence of pneumoconiosis and total disability. *Id.* The miner appealed to the Board but his appeal was later dismissed at his request. [*C.C.*] *v. Julia Trucking Inc.*, BRB No. 01-0850 BLA (Order) (Aug. 23, 2001) (unpub.). On February 2, 2002, claimant filed a Motion to Voluntarily Withdraw Claim with the district director, requesting that his June 16, 1999 claim be withdrawn. *Id.* By Order dated March 28, 2002, the district director granted claimant's motion on the ground that it was in claimant's best interest to have his June 16, 1999 withdrawn and treated as if it had never been filed. *Id.* The miner then filed a claim on April 16, 2002, which was processed by the district director as a subsequent claim. Director's Exhibit 2. Due to the miner's death, claimant is now pursuing her husband's claim. She also filed a survivor's claim on December 2, 2003. Director's Exhibit 32. A hearing was held on December 9, 2003 and Administrative Law Judge Kenneth A. Krantz (the administrative law judge) issued his Decision and Order Denying Benefits on October 26, 2007, which is the subject of this appeal.

² 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

³ Although 20 C.F.R. §725.310 has been revised, the revisions apply only to claims filed on or after January 19, 2001. *See* 65 Fed. Reg. 79920 (2000).

judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). According, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in failing to find the positive x-ray readings and medical opinions of Drs. Baker and Simpao to be sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Claimant also contends that the administrative law judge erred in failing to credit the miner's death certificate, which listed pneumoconiosis as a cause of the miner's death, pursuant to Section 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal unless specifically requested to do so by the Board.⁴

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁵ 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 the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner suffered from pneumoconiosis arising out of coal mine employment, that he was totally disabled by a respiratory or pulmonary impairment, and that his total disability was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge erred in finding that the miner did not have pneumoconiosis. Pursuant to Section 718.202(a)(1), claimant asserts that the administrative law judge improperly relied on the readers' credentials, merely counted the negative x-ray readings for pneumoconiosis, and "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. We disagree. The administrative

⁴ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that: 1) the 1991 claim was improperly withdrawn; 2) the 2002 claim is a request for modification; and 3) that the newly submitted evidence was sufficient to establish total disability and a change in conditions under Section 725.310 (2000).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

law judge outlined the x-ray evidence developed in conjunction with the miner's prior claims, dated from 1973-1999, but determined, in light of the progressive nature of pneumoconiosis, to "place more weight on the most recent x-rays" taken in 2002, that were developed in conjunction with the miner's modification request. Decision and Order at 17. The administrative law judge considered three x-rays dated March 23, 2002, June 11, 2002 and June 14, 2002. *Id.* The administrative law judge correctly noted that the March 23, 2002 x-ray was read as negative by Dr. West, a dually qualified Board-certified radiologist and B reader, and as positive by Dr. Baker, who "possessed no particular qualifications for x-ray interpretation at the time" of his reading. Decision and Order at 17; Director's Exhibit 11; Employer's Exhibit 2. Similarly, the administrative law judge found that the June 11, 2002 x-ray was read as negative for pneumoconiosis by Dr. West and as positive by Dr. Simpao, who "possess[ed] no particular qualifications for interpreting x-rays" at the time of his reading.⁶ Decision and Order at 17; Director's Exhibit 9; Employer's Exhibit 3. *Id.* Lastly, the June 14, 2002 x-ray was read as negative by Drs. Halbert and Poulos, both dually qualified radiologists. Decision and Order at 17; Director's Exhibit 13; Employer's Exhibit 1.

In weighing the x-ray evidence at Section 718.202(a)(1), the administrative law judge credited the negative readings by the most qualified radiologists and permissibly found that all three of the x-rays of record were negative for pneumoconiosis. Decision and Order at 17. Because the administrative law judge performed both a quantitative and qualitative analysis of the x-ray evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence at 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); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

With respect to Section 718.202(a)(4), the administrative law judge considered all of the medical opinions of record as to whether the miner had clinical or legal pneumoconiosis and credited the opinions of Drs. Dahhan and Castle, that the miner did not have pneumoconiosis, as he found their opinions to be reasoned and documented. Claimant contends that the administrative law judge erred in rejecting the diagnoses of pneumoconiosis by Drs. Baker and Simpao in his analysis of the evidence at Section 718.202(a)(4). Claimant's Brief at 5-6. We disagree.

In weighing the medical opinion evidence at Section 718.202(a)(4), the administrative law judge correctly noted that Dr. Baker diagnosed that the miner had pneumoconiosis based primarily on the miner's history of coal dust exposure, and his

⁶ The administrative law judge acknowledged that Dr. Barrett, a B reader and Board-certified radiologist, interpreted the June 11, 2002 film for quality purposes only. Decision and Order at 7, 17; Director's Exhibit 10.

own positive reading of the March 23, 2002 x-ray. Decision and Order at 21; Director's Exhibit 11. Contrary to claimant's assertion, the administrative law judge permissibly found Dr. Baker's opinion to be "compromised" by the fact that the March 23, 2002 x-ray that he read as positive for pneumoconiosis was reread by a better qualified reader as negative for pneumoconiosis. Decision and Order at 21; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003). The administrative law judge also permissibly accorded Dr. Baker's opinion less weight as he found that Dr. Baker did not discuss the effects of the miner's heart condition in relation to his diagnosis of pneumoconiosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Decision and Order at 21. Thus, we affirm the administrative law judge's decision to assign Dr. Baker's opinion less weight at Section 718.202(a)(4).

Furthermore, the administrative law judge properly noted that while Dr. Simpao's report listed several factors that he considered in diagnosing that the miner had pneumoconiosis, *i.e.*, x-ray, EKG, pulmonary function test, symptoms and physical findings, Dr. Simpao did not specifically explain how the objective evidence or the miner's physical findings supported his opinion. *Clark*, 12 BLR at 1-151; Decision and Order at 21. The administrative law judge also considered Dr. Simpao's diagnosis of pneumoconiosis to be less persuasive since the x-ray upon which Dr. Simpao based his opinion had been read by a better qualified reader as negative for pneumoconiosis. *Williams*, 338 F.3d at 514, 22 BLR at 2-648-49; Decision and Order at 21. We, therefore, affirm the administrative law judge's decision to assign less weight to Dr. Simpao's opinion pursuant to Section 718.202(a)(4).

As claimant does not otherwise challenge the administrative law judge's weighing of the medical opinion evidence or his specific credibility determinations, we affirm the administrative law judge's finding that claimant failed to establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4). Thus, because substantial evidence supports the administrative law judge's finding that the miner did not have pneumoconiosis, we affirm the administrative law judge's denial of benefits in the miner's claim. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Turning to the survivor's claim, in order 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 pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

As noted by the administrative law judge, the only evidence in the survivor's claim as to the cause of the miner's death was the death certificate and a medical report by Dr. Repsher. The death certificate was signed by Mr. Walker, the Leslie County coroner, who listed coal workers' pneumoconiosis as the cause of the miner's death. Director's Exhibit 37. Contrary to claimant's contention, the administrative law judge properly found that the death certificate, in and of itself, was insufficient to satisfy claimant's burden of proof "because there is no evidence that the coroner is a physician who had some reasonable basis for listing coal workers' pneumoconiosis as a cause of death." Decision and Order at 23; see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Clark*, 12 BLR at 1-151; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Additionally, the administrative law judge correctly noted that Dr. Repsher, the only other physician of record to address the cause of the miner's death, opined that the miner died of ischemic cardiomyopathy with congestive heart failure. Decision and Order at 23; Director's Exhibit 39.

Because the administrative law judge properly determined that the record evidence was insufficient to establish that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's findings pursuant to Section 718.205(c), and his denial of benefits in the survivor's claim. *Griffith*, 49 F.3d at 186, 19 BLR at 2-116.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge