

BRB Nos. 08-0672 BLA
and 08-0673 BLA

C.H.)	
(Widow of and o/b/o I.H.))	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 04/27/2009
v.)	
)	
KEM COAL COMPANY d/b/a)	
PRO-LAND, INCORPORATED)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Decisions and Orders Denying Benefits of Larry W. Price,
Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for
employer.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank
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 appeals the Decisions and Orders Denying Benefits (03-BLA-6564, 06-BLA-5793) of Administrative Law Judge Larry W. Price rendered on a miner's claim and 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 credited the miner with thirteen years of coal mine employment.² Considering the same evidence in both claims, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits in both the miner's and survivor's claims.³

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1),(4). Claimant further asserts that the administrative law judge erred in finding that total disability was not established in the miner's claim, and erred in determining that the miner's death was not due to pneumoconiosis.⁴ Additionally, with

¹ Claimant is the surviving spouse of the miner, who died on August 4, 2004. Claimant is pursuing both the miner's claim and her survivor's claim. The miner filed his claim on October 4, 2001, and claimant filed her survivor's claim on August 30, 2004. Director's Exhibits 1, 33. The administrative law judge issued two separate decisions on the same day denying each claim, and claimant appealed both decisions. The Board has assigned claimant's appeal of the denial of the survivor's claim BRB No. 08-0672 BLA, and her appeal of the denial of the miner's claim BRB No. 08-0673 BLA. [*C.H.*] *v. Kem Coal Co.*, BRB Nos. 08-0672 BLA and 08-0673 BLA (July 14, 2008)(unpub. Order).

² The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 2, 34. Accordingly, this case arises within the jurisdiction 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*).

³ In the miner's claim, the administrative law judge went on to find that although the medical evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), since claimant did not establish that the miner had pneumoconiosis, she could not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

⁴ Contrary to claimant's assertion, the administrative law judge found that total disability was established in the miner's claim. Further, in the survivor's claim, the administrative law judge did not reach the issue of whether the miner's death was due to pneumoconiosis. Therefore, we will not further address claimant's arguments on these two issues.

respect to the miner's claim, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide the miner with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds, urging affirmance of the denial of benefits in both claims. The Director declined to file a substantive response to the appeal of the denial of the survivor's claim. However, the Director responds in support of the denial of the miner's claim, asserting that the Board should reject claimant's argument that the miner was not provided with a complete pulmonary evaluation.⁵

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits on the miner's claim under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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.⁶ 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a)(1)-(3),(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Failure to establish any one of these elements precludes entitlement. *Trumbo*, 17 BLR at 1-87; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In this case, the administrative law judge found that the threshold element of the existence of pneumoconiosis was not established in either claim. Since the

⁵ We affirm the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2),(3), as they are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ For survivors' claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

administrative law judge rendered identical findings based on the same evidence in both claims, we will address the administrative law judge's findings in both the miner's and survivor's claims together.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of three x-rays dated November 5, 2001, March 7, 2002, and February 17, 2004, and considered the readers' radiological qualifications. Dr. Simpao, with no known radiological qualifications, interpreted the November 5, 2001 x-ray as positive for pneumoconiosis, while Dr. Poulos, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis.⁷ Director's Exhibits 11, 26. Dr. Halbert, a B reader, interpreted the March 7, 2002 and February 17, 2004 x-rays as negative for pneumoconiosis. Employer's Exhibit 1.

Based on Dr. Poulos's superior radiological credentials, the administrative law judge reasonably accorded greater weight to Dr. Poulos's negative reading of the November 5, 2001 x-ray, and found that x-ray to be negative for pneumoconiosis. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Miner's Claim Decision and Order at 11; Survivor's Claim Decision and Order at 10. Since there were no positive x-rays, the administrative law judge found that claimant did not establish the existence of pneumoconiosis. The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *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); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, that he deferred to the numerical superiority of the negative readings, and that he "may have 'selectively analyzed'" the x-ray evidence, lack merit. Claimant's Brief in Miner's Claim at 3; Claimant's Brief in Survivor's Claim at 3. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical opinions. Dr. Simpao⁸ diagnosed "CWP 1/1," and stated that "multiple years of coal dust exposure [were] medically significant in [the miner's] pulmonary impairment." Director's Exhibit 8 at 4. By contrast, Drs. Broudy and Rosenberg, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, opined that the

⁷ Dr. Sargent, a Board-certified radiologist and B reader, reviewed the November 5, 2001 x-ray for its film quality only. Director's Exhibit 12.

⁸ The administrative law judge found that the record did not establish Dr. Simpao's qualifications. Decision and Order at 9 n.5.

miner did not have either clinical or legal pneumoconiosis.⁹ Director’s Exhibit 31; Employer’s Exhibits 1-3. The administrative law judge discounted the diagnosis of pneumoconiosis by Dr. Simpao, as not well-reasoned or well-documented, because Dr. Simpao had relied solely on a positive x-ray reading and the miner’s coal dust exposure history. Miner’s Claim Decision and Order at 12; Survivor’s Claim Decision and Order at 11. By contrast, the administrative law judge found the opinions of Drs. Broudy and Rosenberg, that the miner did not have pneumoconiosis, to be better reasoned and documented. Further, he found that their opinions merited greater weight based on their superior qualifications. He therefore found Dr. Simpao’s opinion outweighed by those of Drs. Broudy and Rosenberg.

Claimant contends that the administrative law judge erred in rejecting Dr. Simpao’s opinion as based on a positive x-ray reading that was “contrary to the [administrative law judge’s] findings.” Claimant’s Brief in Survivor’s Claim at 4. Contrary to claimant’s contention, the administrative law judge reasonably discounted Dr. Simpao’s diagnosis of “CWP 1/1,” since it was based only on Dr. Simpao’s own x-ray reading and claimant’s coal dust exposure history. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-10 (6th Cir. 2000); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). The administrative law judge also reasonably found that Dr. Simpao failed to otherwise explain how the documentation underlying his report supported his diagnosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Claimant argues that Dr. Simpao’s opinion was well-reasoned and documented and should not have been discredited. Claimant’s Brief in Survivor’s Claim at 4. Claimant essentially requests a reweighing of the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge’s permissible determination that the opinion of Dr. Simpao was not as well-reasoned as the contrary opinions of Drs. Broudy and Rosenberg, and that Drs. Broudy and Rosenberg possessed superior qualifications. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Consequently, we affirm the administrative law judge’s finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).¹⁰

⁹ “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

¹⁰ We reject claimant’s assertion that the administrative law judge “appears to have” substituted his opinion for that of a medical expert, in the absence of any supporting evidence for this assertion. Claimant’s Brief in Survivor’s Claim at 5.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in both a miner's and a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits in both claims. *See Trumbo*, 17 BLR at 1-87; *Anderson*, 12 BLR at 1-112.

Lastly, with respect to the miner's claim, claimant argues that the Director failed to provide the miner with a complete pulmonary evaluation, as required under the Act, because the administrative law judge found that Dr. Simpao's report "was based merely upon an erroneous x-ray interpretation, and . . . was outweighed by the better qualified physicians of record." Claimant's Brief in Miner's Claim at 4 (citation omitted). The Director responds that the administrative law judge's finding that Dr. Simpao's opinion was outweighed by the contrary opinions of Drs. Broudy and Rosenberg does not mean that the Director failed to satisfy his statutory obligation to provide a complete pulmonary evaluation. Director's Brief at 3-4. We agree.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 8. As discussed above, the administrative law judge discounted Dr. Simpao's diagnosis of pneumoconiosis because it was based on Dr. Simpao's reading of a chest x-ray, which the administrative law judge had found outweighed by the negative reading of a physician with superior radiological qualifications, and because Dr. Simpao failed to otherwise adequately explain the basis for his diagnosis. Additionally, the administrative law judge permissibly chose to accord greater weight to the better-reasoned and documented opinions of Drs. Broudy and Rosenberg. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). In sum, we agree with the Director that the administrative law judge found Dr. Simpao's opinion to be outweighed, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Accordingly, the administrative law judge's Decisions and Orders Denying Benefits in both the miner's and survivor's claims are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge