

BRB No. 07-0354 BLA

D.T. (Widow of D.T.) )  
D.T. (Deceased Miner) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 ) DATE ISSUED: 01/31/2008  
BROWNIES CREEK COLLIERIES )  
c/o ACORDIA EMPLOYERS SERVICE )  
 )  
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

D.T., Harlan, Kentucky, *pro se*.<sup>1</sup>

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

PER CURIAM:

Claimant, the surviving spouse of the deceased miner, appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (04-BLA-0059, 04-BLA-5464) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

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<sup>1</sup> Ron Carson, the Program Director of Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the 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).

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> This case involves both a request for modification of the denial of benefits in the miner's claim, and a survivor's claim.<sup>3</sup> In his decision, the administrative law judge credited the miner with at least thirteen years of coal mine employment. The administrative law judge found that there was no mistake in a determination of fact in Administrative Law Judge Joseph E. Kane's prior findings that the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b) were not established. Moreover, the administrative law judge found that a change in conditions was not established because the newly submitted evidence did not establish the existence of pneumoconiosis or total disability. The administrative law judge therefore denied the miner's request for modification pursuant to 20 C.F.R. §725.310 (2000). In the survivor's claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

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<sup>2</sup> 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.

<sup>3</sup> The miner's claim was filed on March 17, 1994, and was initially denied by the district director on August 31, 1994. Director's Exhibits 1, 17 (miner's claim). Thereafter, the miner filed three requests for modification. His first such request, filed on July 31, 1995, was denied by Administrative Law Judge Joseph E. Kane on August 31, 1999, because the miner did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibits 22, 96 (miner's claim). His second modification request, filed on August 15, 2000, was denied by the district director on November 21, 2000. Director's Exhibits 97, 100 (miner's claim). The miner's third modification request, filed on March 29, 2001, was pending at the time of his death on April 15, 2001. Director's Exhibits 101, 103 (miner's claim). On June 4, 2001, the district director denied modification, and the miner's representative requested a hearing. Director's Exhibits 104, 105 (miner's claim). The survivor's claim was filed on January 16, 2002. Director's Exhibit 2 (survivor's claim). Judge Kane consolidated both the miner's and survivor's claims for hearing on August 8, 2002, and subsequently, both claims were referred for a formal hearing as requested. Director's Exhibit 109 (miner's claim). The parties designated the evidence in the survivor's claim in accordance with the evidentiary limitations at 20 C.F.R. §725.414, which apply to the survivor's claim because it was filed after January 19, 2001, the effective date of the revised regulations. *See* 20 C.F.R. §725.2(c). The administrative law judge correctly noted that the miner's claim, filed prior to January 19, 2001, was not subject to the evidentiary limitations. *Id.*

On appeal, claimant generally challenges the administrative law judge's denial of benefits in both claims. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

In an appeal by a claimant filed 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, 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 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. Failure to establish any one of these elements precludes 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).

Section 725.310 (2000) provides that a party may request modification of an award or denial of benefits on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, the administrative law judge has the authority to "reconsider all the evidence for any mistake of fact or change in conditions."<sup>4</sup> *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge correctly noted that, of seventy-nine readings of forty x-rays taken between January 1976 and July 1997 that were considered by Judge Kane, none was positive for pneumoconiosis. The administrative law judge then considered three additional x-rays that were taken since Judge Kane's denial of the miner's first modification request. Dr. Smiddy, who lacks radiological credentials, interpreted the February 24, 1999 x-ray as "consistent with pneumoconiosis," but did not classify the x-ray as positive under the ILO system. Director's Exhibit 101 (miner's claim); *see* 20 C.F.R. §718.102(b). Dr. Ramakrishnan, who is a Board-certified radiologist and B reader, read the February 17, 2000 x-ray as

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<sup>4</sup> The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 3 (miner's claim). 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*).

negative for pneumoconiosis. Director's Exhibit 97 (miner's claim). Additionally, Dr. Baker, who is a B reader, read the September 26, 2000 x-ray as positive for pneumoconiosis. Director's Exhibit 23 (survivor's claim). Placing the most weight on Dr. Ramakrishnan's negative reading because of the physician's superior radiological qualifications, the administrative law judge permissibly found that the new x-ray readings, together with the prior x-ray readings, failed to establish the existence of pneumoconiosis. *See Staton v. Norfolk v. 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 v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order at 12; Director's Exhibit 23 (survivor's claim); Director's Exhibits 97, 101 (miner's claim). Thus, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) in the miner's claim.

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered two biopsy reports. Dr. O'Daniel-Pierce diagnosed metastatic carcinoma of the lung. Director's Exhibit 8 (survivor's claim); Director's Exhibit 109 (miner's claim) Dr. Naeye, who is Board-certified in Anatomical and Clinical Pathology, reviewed the biopsy slides and concluded that although anthracotic pigment was present in the miner's lymph nodes, "clinically significant coal worker[s'] pneumoconiosis (CWP) is probably absent in the lungs of this man." Director's Exhibit 26 (survivor's claim). Dr. Naeye stated further that the medical literature has not documented any relationship between coal mine dust exposure and lung cancer. *Id.* The administrative law judge rationally found that pneumoconiosis was not established, because Dr. O'Daniel-Pierce did not diagnose pneumoconiosis, and because Dr. Naeye's reasoning and his qualifications bolstered his opinion that pneumoconiosis was probably absent. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 13; Director's Exhibits 8, 26 (survivor's claim); Director's Exhibits 109 (miner's claim). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by biopsy pursuant to 20 C.F.R. §718.202(a)(2) in the miner's claim.

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge properly found that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 13; Director's Exhibit 96 (miner's claim) at 19-20.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the medical opinions that were previously considered by Judge Kane and agreed with his determination that the better reasoned opinions did not establish the existence of

pneumoconiosis.<sup>5</sup> Turning to the medical opinions that were submitted since Judge Kane's decision, the administrative law judge rationally accorded less weight to the opinions of Drs. Morgan, Rader, and Smiddy, all of whom diagnosed pneumoconiosis, because the opinions were based in part on inaccurate, inconsistent, or non-specific smoking histories. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n.4 (1983); Decision and Order at 14; Director's Exhibits 27 at 6; 28 at 9 (survivor's claim); Director's Exhibits 96 at 13; 97, 101 (miner's claim). The administrative law judge further found, within his discretion, that Dr. Morgan did not explain his diagnosis of pulmonary fibrosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 14; Director's Exhibit 28 (survivor's claim) at 7.

Further, the administrative law judge reasonably accorded only some weight to Dr. Baker's December 19, 2000 and April 2, 2003 opinions that the miner had pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 14; Director's Exhibit 23 (survivor's claim); Director's Exhibit 101 (miner's claim). Specifically, the administrative law judge found that Dr. Baker relied, in part, on a positive x-ray reading that was at odds with Dr. Ramakrishnan's negative reading, which the administrative law judge had credited based on Dr. Ramakrishnan's superior credentials. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). The administrative law judge noted further that although Dr. Baker also relied on a CT scan reading, the CT scan reading was not of record. Moreover, the administrative law judge found that Dr. Baker failed to explain the discrepancy between his diagnosis of pneumoconiosis and the biopsy report which did not reveal pneumoconiosis, and failed to account for how the miner's twenty-five pack year smoking history may have contributed to his pulmonary condition. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Lastly, the administrative law judge rationally found that Dr. Castle's May 13, 2003 opinion that the miner did not have pneumoconiosis was the best reasoned opinion and merited the greatest weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 15; Director's Exhibit 25 (survivor's claim). The administrative law judge

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<sup>5</sup> Judge Kane had found that in the previously submitted opinions, Drs. Morgan, Wayne, and Woolum did not diagnose pneumoconiosis, Dr. Baker was equivocal as to whether the miner had pneumoconiosis, and Dr. Michelson's opinion diagnosing pneumoconiosis was conclusory and not well reasoned. Director's Exhibit 96 (miner's claim) at 20-21. He had further found that Dr. Rader's diagnosis of pneumoconiosis was outweighed by the contrary opinions of better-qualified physicians. Director's Exhibit 96 (miner's claim) at 21-22.

found that Dr. Castle's opinion was supported by a history of physical findings, as well as the x-ray evidence. Moreover, the administrative law judge credited Dr. Castle's opinion because he had considered the miner's obesity and cardiac disease, along with an accurate smoking history, and had explained their role as causes for the miner's pulmonary symptoms. Substantial evidence supports the administrative law judge's permissible credibility determination. *See Anderson*, 12 BLR at 1-113. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) in the miner's claim.

Because substantial evidence supports the administrative law judge's findings that the existence of pneumoconiosis was not established in the miner's claim pursuant to 20 C.F.R. §718.202(a), we affirm the administrative law judge's findings that neither a mistake in a determination of fact nor a change in conditions was established in this essential element of the miner's claim pursuant to 20 C.F.R. §725.310 (2000). We therefore affirm the denial of benefits in the miner's claim. *See Anderson*, 12 BLR at 1-112.

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 his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo*, 17 BLR at 1-87. For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1),(3), or 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); *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). Failure to establish any one of these elements precludes entitlement.<sup>6</sup> *See Anderson*, 12 BLR at 1-112.

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<sup>6</sup> In finding that claimant did not establish that the miner had pneumoconiosis in the survivor's claim, the administrative law judge stated that "[b]ecause my finding above [in the miner's claim] included all the evidence submitted in conjunction with the survivor's claim, I find that [claimant] has failed to establish the existence of pneumoconiosis" in the survivor's claim. Decision and Order at 18. The administrative law judge erred in this respect, because his finding that pneumoconiosis was not established in the miner's claim was based on x-ray readings and medical opinion evidence that were not admissible in the survivor's claim, because they were not designated as evidence by the parties in accordance with 20 C.F.R. §725.414, and the

Pursuant to Section 718.205(c), the administrative law judge considered all relevant evidence. The administrative law judge permissibly placed no weight on the death certificate dated April 15, 2001, listing metastatic lung cancer as the immediate cause of death and coal workers' pneumoconiosis as a significant condition contributing to death, because there was no evidence that the deputy coroner who completed the certificate had any knowledge of the miner's condition. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); Decision and Order at 18; Director's Exhibit 103 (miner's claim).

The administrative law judge permissibly accorded less weight to Dr. Morgan's May 15, 2001, opinion that the miner's lung impairment due to pneumoconiosis was a major contributing factor in his death from lung cancer, because Dr. Morgan, in his deposition of April 18, 2003, was unable to state with any degree of certainty whether the miner would have lived longer absent his pneumoconiosis. *See Williams*, 338 F.3d at 517, 22 BLR at 2-654; Decision and Order at 18-19; Director's Exhibit 28 (survivor's claim) at 11. Moreover, the administrative law judge permissibly discounted Dr. Morgan's opinion, because Dr. Morgan did not explain his statement that coal dust exposure is a risk factor for lung cancer. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 18; Director's Exhibit 28 (survivor's claim) at 10.

Additionally, the administrative law judge rationally discounted Dr. Baker's April 2, 2003 opinion that the miner's death was hastened by coal workers' pneumoconiosis, because Dr. Baker's statement that he "always" feels that death is hastened by pneumoconiosis where a miner has a ventilatory defect and coal dust exposure and dies a pulmonary death, was a "broad-based assumption . . . not tailored to the miner's case." *See Williams*, 338 F.3d at 518, 22 BLR at 2-655; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 19; Director's Exhibit 23 (survivor's claim). Additionally, the administrative law judge rationally discounted Dr. Baker's opinion because he assumed, without objective support, that the miner's "overall medical condition" that prevented him from doing well with his lung cancer therapy was due to coal workers' pneumoconiosis. *Id.* Further, the administrative law judge reasonably accorded little weight to Dr. Rader's May 8, 2003 opinion that pneumoconiosis was a

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administrative law judge did not otherwise find good cause for their admission. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241-1-242 (2007)(*en banc*). However, the administrative law judge's error was harmless, because, as we will discuss, substantial evidence supports the administrative law judge's alternative finding that the medical evidence did not establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in the survivor's claim. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

major contributing factor to the miner's death, because Dr. Rader had provided no explanation for his opinion. *See Clark*, 12 BLR at 1-155; Decision and Order at 19; Director's Exhibits 24 (survivor's claim).

By contrast, the administrative law judge permissibly accorded more weight to Dr. Castle's May 13, 2003 opinion that the miner's death was due solely to lung cancer related to his smoking habit, because Dr. Castle's opinion was better supported by the miner's medical history and by the objective data of record. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 19; Director's Exhibit 25 (survivor's claim). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c), which we therefore affirm. Because claimant did not establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim under Part 718, we affirm the administrative law judge's denial of benefits.



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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge