BRB No. 09-0301 BLA

BETTIE JEAN BROCK (Widow of ELMO BROCK)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 01/14/2010
PEABODY 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 on Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Bettie Jean Brock, Holmes Mill, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits on Remand (2006-BLA-05505) of Administrative Law Judge Robert D. Kaplan, with respect to a request for modification of the denial of the miner's duplicate claim and an initial 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] This case is before the Board for a second time.[2] In its previous decision,

[1] Claimant is the surviving spouse of the miner, Elmo Brock, who died on April 11, 2001. Director's Exhibit 9. Jerry Murphree, a benefits counselor with Stone

the Board affirmed the administrative law judge's determination in the miner's claim that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3), but vacated the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *B.B.* [*Brock*] *v. Peabody Coal Co.*, BRB No. 07-0708 BLA, slip op. at 5-6 (May 28, 2008)(unpub.) Accordingly, the Board also vacated the administrative law judge's determination that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §§725.309 (2000), 725.310 (2000).[3] *Id*. at 6. The Board also vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.205(c) in the survivor's claim. *Id*. at 9-10. The Board instructed the administrative law judge to reconsider on remand whether the newly submitted evidence relevant to 20 C.F.R. §§718.202(a)(4), 718.204(b), established a material change in conditions in the miner's claim. *Id*. at 6-7. Regarding the survivor's claim, the Board directed the administrative law judge to limit his consideration to the evidence designated for admission in the survivor's claim and to properly evaluate the medical opinion evidence. *Id*. at 10.

On remand, the administrative law judge reiterated his previous finding that the miner had twenty-seven years of coal mine employment. He also again found that, in the miner's claim, the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, thus, was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §§725.309 (2000), 725.310 (2000). Further, the administrative law judge determined that the evidence, as a whole, failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). As to the survivor's claim, the administrative law judge determined that claimant did not prove that the miner had pneumoconiosis at 20 C.F.R. §718.202(a), and did not demonstrate that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20

Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but he is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] The complete procedural history of this case, set forth in the Board's prior decision in *B.B.* [*Brock*] *v. Peabody Coal Co.*, BRB No. 07-0708 BLA, slip op. at 1-2 (May 28, 2008)(unpub.), is incorporated herein by reference.

[3] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, effective January 19, 2001. As the miner's current claim was filed prior to January 19, 2001, the amended version of 20 C.F.R. §725.310 does not apply in this case. 20 C.F.R. §725.2.

C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

Claimant generally contests the denial of benefits in the miner's claim and the survivor's claim. Employer responds, urging affirmance of the administrative law judge's 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 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[4] 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 under 20 C.F.R. Part 718 in the miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure 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)(*en banc*).

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 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 the 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, 17 BLR 2-135 (6th Cir. 1993). 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).

[4] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 1. 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 (1989)(*en banc*).

I. Miner's Claim

Upon review of the administrative law judge's findings in the miner's claim, we affirm them, as they are rational and supported by substantial evidence. In evaluating whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, thus, a material change in conditions pursuant to 20 C.F.R. §§725.309 (2000), 725.310 (2000), the administrative law judge considered newly submitted evidence consisting of the miner's death certificate and the medical opinions of Drs. Smiddy, Cohen, Branscomb, and Fino.[5] The administrative law judge permissibly assigned no weight to the miner's death certificate because Dr. Cooperstein did not provide a basis for her determination that the miner had "black lung" or pneumoconiosis. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order on Remand at 4; Director's Exhibit 9. The administrative law judge also acted within his discretion in giving no weight to Dr. Smiddy's opinion, that the miner's obstructive impairment was related to coal dust exposure, because Dr. Smiddy relied on inaccurate information regarding the miner's smoking history and did not fully address the miner's use of cigarettes in addition to a pipe.[6] *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12

[5] The administrative law judge accurately noted that the Board previously affirmed his findings that Dr. Irvin's treatment records and June 23, 2000 letter, and Dr. Cooperstein's August 11, 2003 letter, were entitled to no weight. *Brock*, slip op. at 5; Decision and Order on Remand at 4.

[6] The administrative law judge summarized the evidence regarding the miner's smoking history as follows:

> Dr. Dahhan's report dated October 16, 1998, states that the miner reported having smoked cigarettes, that he ceased smoking 20 years earlier, and the miner did not know how many cigarettes he had smoked daily. Dr. Dahhan's report dated April 28, 1997, states that the miner smoked one pack a day until 20 years earlier. Reports dated May 13 and June 19, 1997, state that the miner smoked a pipe for 30 years, ending one year before.

Decision and Order on Remand at 5 n. 2. The administrative law judge further noted that Dr. Cohen recorded a thirty-year history of pipe smoking. *Id*. at 5. The administrative law judge concluded, "it has been credibly reported that the miner was . . . a one-pack-a-day cigarette smoker" and "a good case could be made that he smoked both cigarettes and a pipe – and that he did so concurrently as well as during separate periods of time." *Id*. At his deposition, Dr. Smiddy testified that the miner smoked a pipe "some," but also acknowledged that, on the printout of the July 20, 2000 pulmonary function study, the miner was identified as a ten pack-year smoker. Director's Exhibit 1 (Deposition Transcript at 25-26). Dr. Smiddy opined that such a history was sufficient

BLR 2-121 (6th Cir. 1989); *Mabe v. Bishop Coal Co*., 9 BLR 1-67 (1986). In addition, the administrative law judge permissibly assigned Dr. Cohen's opinion, that coal dust exposure contributed to the miner's pulmonary impairment, no weight because he did not address the significance of the miner's use of cigarettes in addition to a pipe.[7] *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Employer's Exhibit 3 at 26. Because the administrative law judge acted within his discretion in finding that the death certificate and opinions of Drs. Smiddy and Cohen, the only new evidence supportive of claimant's burden at 20 C.F.R. §718.202(a)(4), were entitled to no weight, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis.

In addition, the administrative law judge's correctly found that none of the previously submitted medical opinions contained diagnoses of clinical or legal pneumoconiosis. Consequently, we affirm the administrative law judge's determination that the record as a whole is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as there is no conclusive evidence of pneumoconiosis in the miner's initial claim.[8] We affirm, therefore, the administrative law judge's denial of benefits in the miner's claim based on the failure to establish the existence of pneumoconiosis, an essential element of entitlement. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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for an individual to develop diseases associated with smoking, including chronic obstructive pulmonary disease. *Id*. As the administrative law judge determined, however, Dr. Smiddy based his initial opinion upon a minimal history of pipe smoking and did not reconsider his opinion in light of credible evidence establishing a more extensive history of pipe smoking and the miner's use of cigarettes as well. *Id*.

[7]As indicated previously, Dr. Cohen recorded a thirty-year history of pipe smoking, but made no reference to whether the miner also smoked cigarettes. Claimant's Exhibit 2; Employer's Exhibit 3 at 11-12.

[8] While the Board, in its previous Decision and Order, directed the administrative law judge to consider the medical treatment records in the duplicate claim diagnosing coal workers' pneumoconiosis, there is no indication that the administrative law judge did so. *See Brock*, slip op. at 7. However, this error is harmless. Although some of the treatment records note a history of possible coal workers' pneumoconiosis or list "black lung" as one of the conditions from which the miner suffered, there is no accompanying documentation indicating that these references constituted independent diagnoses of pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibits 11-13.

II. Survivor's Claim

In considering whether claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge, in compliance with the Board's instructions, considered Dr. Wheeler's interpretation of the July 20, 2000 x-ray, the miner's death certificate, the miner's treatment records, Dr. Branscomb's July 16, 2003 opinion, Dr. Fino's September 10, 2003 opinion, and the opinions and depositions of Drs. Cooperstein and Cohen. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge correctly determined that the only x-ray in evidence is negative for pneumoconiosis, based on Dr. Wheeler's uncontradicted reading. Decision and Order on Remand at 8; Director's Exhibits 1, 13. In addition, because there is no biopsy or autopsy evidence, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). The administrative law judge also accurately stated that because there is no evidence of complicated pneumoconiosis, the presumption at 20 C.F.R. §718.304 is inapplicable. Decision and Order on Remand at 8. The presumptions at 20 C.F.R. §§718.305, 718.306 are also unavailable in this survivor's claim filed after June 30, 1982. Consequently, we affirm the administrative law judge's determination that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3).

Regarding the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge also permissibly found that Dr. Cooperstein's diagnosis of "black lung" or pneumoconiosis on the miner's death certificate was entitled to no weight because Dr. Cooperstein did not provide any rationale for her conclusion. *Addison*, 11 BLR at 1-70. The administrative law judge accurately noted that the Board previously affirmed his assignment of no weight to Dr. Cooperstein's letter diagnosing coal workers' pneumoconiosis. *See Brock*, slip op. at 5. In addition, because Dr. Cooperstein testified at her deposition that she did not make an independent diagnosis of pneumoconiosis, but merely relied on Dr. Smiddy's diagnosis, any error by the administrative law judge in not specifically considering her testimony when addressing the survivor's claim is harmless.[9] *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Exhibit 2 at 21-22.

As to Dr. Cohen's opinion, the administrative law judge again acted within his discretion in finding that his opinion was entitled to no weight because of Dr. Cohen's failure to factor in the miner's complete smoking history. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark*, 12 BLR at 1-155; Employer's Exhibit 3 at 26. Further, the administrative law judge acted within his discretion in determining that the treatment records do not support a finding of pneumoconiosis, as they do not contain an

[9] Dr. Smiddy's report was not designated for admission in the survivor's claim.

explanation for the notations that the miner had coal workers' pneumoconiosis. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Because the administrative law judge rationally determined that the opinions of Drs. Cooperstein and Cohen, the only evidence supportive of a finding of pneumoconiosis, were entitled to no weight, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) in the survivor's claim. In addition, in light of our affirmance of the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), we also affirm the administrative law judge's conclusion that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement. Consequently, we affirm the denial of benefits in the survivor's claim. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Because we have affirmed the denial of benefits in the survivor's claim on this ground, it is unnecessary to address the administrative law judge's findings regarding death causation at 20 C.F.R. §718.205(c). *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge