BRB No. 99-0174 BLA

LETIZZIA T. COLARUSSO (Widow of ANTHONY J. COLARUSSO)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan and Dempsey), Scranton, Pennsylvania, for claimant.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (96-BLA-1676) of Administrative Law Judge Robert D. Kaplan denying benefits on claims filed by the miner and his survivor 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). The miner filed his original claim for black lung benefits on December 29, 1976, which was denied by Administrative Law Judge Gerald Tierney, who found that the miner failed to establish any element of entitlement. The denial of benefits was

affirmed by the Board in a Decision and Order dated March 16, 1987. Decision and Order at 2; Director's Exhibit 64. The miner filed the instant claim on July 6, 1995 and on January 8, 1996, while the claim was pending, the miner died. Decision and Order at 3. On January 23, 1996, the miner's widow, claimant herein, filed a survivor's claim. Decision and Order at 3; Director's Exhibit 37. The district director denied both claims and the case was referred to the Office of Administrative Law Judges. The administrative law judge decided this case on the record as the parties waived a formal hearing, credited the miner with fifteen and one-half years of coal mine employment and adjudicated the miner's duplicate claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found that the evidence submitted since the previous denial was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in the miner's claim. With respect to the survivor's claim, the administrative law judge found that as the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), entitlement was precluded. Accordingly, benefits were denied on both claims. On appeal herein, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1)-(2), (4), total disability established pursuant to 20 C.F.R. §718.204(c)(4) and death due to pneumoconiosis established pursuant to 20 C.F.R. §718.205. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 a 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 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*). Additionally, to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 on a survivor's claim filed after January 1, 1982,

claimant not only must establish that the miner suffered from pneumoconiosis and that the pneumoconiosis arose out of coal mine employment, but claimant must also establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Initially we address the administrative law judge's consideration of the miner's duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge properly found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a). In his consideration of the x-ray evidence, the administrative law judge correctly stated the physicians' qualifications and rationally found that the x-rays read negative[1] outweighed the single x-ray read uniformly positive, Decision and Order at 5-6; Director's Exhibits 19-23, 44-47, 64, and we find no merit to claimant's suggestion that the administrative law judge should have rejected Dr. Barrett's negative readings of the x-rays taken subsequent to the miner's 1995 positive x-ray. The administrative law judge thus permissibly found that claimant failed to establish the existence of pneumoconiosis by a preponderance of x-ray evidence. Decision and Order at 6. In so finding, contrary to claimant's argument, the administrative law judge considered both the quality and quantity of the x-ray readings in his weighing of the x-ray evidence and rationally accorded greater weight to the preponderance of negative x-ray interpretations. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Inasmuch as the administrative law judge weighed all of the x-ray interpretations and reasonably concluded that the

[1] Included in the x-rays deemed to be negative by the administrative law judge was a positive reading of the August 23, 1994 x-ray. Since this x-ray was read positive by one reader who was both a B-reader and board-certified radiologist, but negative by two equally qualified readers, the administrative law judge considered it to be a negative x-ray in his evaluation of the evidence.

preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Further, in determining whether the existence of pneumoconiosis was established by autopsy evidence pursuant to Section 718.202(a)(2), the administrative law judge discussed the conclusions of Dr. Valderrama, the autopsy prosector, and Dr. Naeye, who reviewed the autopsy report and slides. Decision and Order at 6. The administrative law judge reasonably found, within his discretion as fact-finder, that since Dr. Valderrama stated that the lungs contained "black markings" and "black pigmentation", but no associated nodules, his diagnosis of macular anthrosilicosis was based on his finding of black pigmentation and did not therefore establish the existence of pneumoconiosis. 20 C.F.R. §718.201; Decision and Order at 6; Director's Exhibit 25. The administrative law judge also acknowledged that Dr. Naeye opined the lungs contained black pigment and black deposits, but that coal worker's pneumoconiosis was absent. Decision and Order at 6; Director's Exhibit 26. The administrative law judge thus rationally found that the autopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and this finding is affirmed. *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Simila v. Bethlehem Mines Corp.*, 7 BLR 1-535 (1984), *vacated in part on other grounds sub nom.*, *Bethlehem Mines Corp. v. Director, OWCP*, 766 F.2d 128, 8 BLR 2-4 (3d Cir. 1985).[2]

[2] In addition, the administrative law judge found that the presumptions enumerated at Section 718.202(a)(3) are inapplicable to the miner's claim as the record contains no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the miner filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305; and died after March 1, 1978. *See* 20 C.F.R. §718.306; Decision and Order at 7. Consequently, as this finding is unchallenged on appeal, we affirm the administrative law judge's finding that claimant is precluded from establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(3) in the miner's claim. *Skrack v.*

In weighing the newly submitted medical opinions of record on the issue of the existence of pneumoconiosis, the administrative law judge also rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Perry*, *supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinions of Drs. Callahan and Sahillioglu, which diagnosed pneumoconiosis, were not well-documented and reasoned as Dr. Callahan, in spite of his status as the miner's treating physician, relied on an inflated coal mine employment history, did not discuss miner's smoking history and stated that black pigmentation constitutes pneumoconiosis while Dr. Sahillioglu relied solely on a positive x-ray reading where the weight of the x-ray evidence as a whole was overwhelmingly negative. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 8-9. Contrary to claimant's assertion, the administrative law judge's correctly noted that Dr. Sahillioglu's qualifications are not contained in the record. Decision and Order at 8; *see* Director's Exhibit 17. Inasmuch as the administrative law judge weighed all of the newly submitted medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Clark*, *supra*; *Wetzel*, *supra*; *Lucostic*, *supra*. Moreover, the administrative law judge correctly weighed all of the different types of relevant evidence together to determine whether the miner suffered from pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, we affirm his finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a).

Island Creek Coal Co., 6 BLR 1-710 (1983).

In weighing the newly submitted medical evidence of record on the issue of the existence of a totally disabling respiratory or pulmonary impairment, the administrative law judge rationally concluded that this evidence failed to establish total disability pursuant to Section 718.204(c).[3] In considering the medical opinions pursuant to Section 718.204(c)(4), the administrative law judge permissibly accorded no weight to the medical opinion of Dr. Callahan, that the miner was totally disabled due to pneumoconiosis, since the administrative law judge found his opinion was based solely on his diagnosis of pneumoconiosis which was unsupported by the evidence, he did not diagnose any other respiratory or pulmonary condition and he relied on objective studies that were not contained in the record. *Clark*, *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Lucostic*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 10. Consequently, the administrative law judge acted within his discretion as fact-finder in concluding that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c). Inasmuch as the administrative law judge properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish the existence of pneumoconiosis or total disability, and thus a material change in conditions, we affirm the administrative law judge's denial of benefits in the miner's claim pursuant to 20 C.F.R. §725.309. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

In adjudicating the survivor's claim which was filed by the survivor after January 1, 1982, the administrative law judge properly required claimant to establish that the miner suffered from pneumoconiosis, *see* 20 C.F.R. §718.202(a), and that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) in order to establish entitlement to survivor's benefits. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The administrative law

[3] The administrative law judge's findings that the newly submitted evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) or invocation of the irrebuttable presumption contained in 20 C.F.R. §718.304 are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge correctly found that as claimant failed to establish the existence of pneumoconiosis, as discussed above and after his consideration of the evidence of record as a whole, she cannot establish that the miner's death was due to pneumoconiosis. *Trumbo*, *supra*; Decision and Order at 11. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trumbo*, *supra*; *Neeley*, *supra*; *Trent*, *supra*. Consequently, we affirm the administrative law judge's denial of benefits in the survivor's claim as well.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge