

BRB No. 09-0232 BLA

D.W.	)	
(Widow of E.W.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY	)	
	)	DATE ISSUED: 09/23/2009
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 Paul C. Johnson, Jr.,  
Administrative Law Judge, United States Department of Labor.

D.W., Rutledge, Tennessee, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for  
employer.

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

PER CURIAM:

Claimant appeals,<sup>1</sup> without the assistance of counsel,<sup>2</sup> the Decision and Order Denying Benefits (08-BLA-5145) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a survivor's claim<sup>3</sup> 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). Upon stipulation of the parties, the administrative law judge credited the miner with at least twenty-two years and four months of coal mine employment, and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's weighing of the evidence and his denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> Claimant is the miner's widow, and was represented before the administrative law judge by the Black Lung Program Director at Stone Mountain Health Services of St. Charles, Virginia. Hearing Transcript at 4.

<sup>2</sup> Jerry Murphree, a benefits counselor with 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. Murphree is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>3</sup> The miner died on August 23, 2006, Director's Exhibit 7, and his widow filed a survivor's claim on November 14, 2006. Director's Exhibit 2.

<sup>4</sup> The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was last employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge considered eight interpretations of four x-rays taken on May 19, 2004, September 13, 2004, November 18, 2005, and December 12, 2005, and properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist.<sup>5</sup> *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 4-5.

The administrative law judge determined that the May 10, 2004 x-ray was interpreted as negative for pneumoconiosis, without contradiction, by Dr. Hayes, a dually qualified physician. Employer's Exhibit 2. Dr. Alexander, a dually qualified reader, interpreted the September 13, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 12, and also provided a positive rehabilitative reading, Claimant's Exhibit 2, but Dr. Scott, an equally qualified physician, interpreted this x-ray as negative for the disease. Director's Exhibit 13. Because the miner's September 13, 2004 x-ray was read as both positive and negative by equally qualified physicians, the administrative law judge acted within his discretion in finding that this x-ray was not positive for the

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<sup>5</sup> A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B-reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

existence of pneumoconiosis. See 20 C.F.R. §718.202(a); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Decision and Order at 4. Although Dr. Ahmed, a dually qualified physician, interpreted the miner's November 18, 2005, x-ray as positive for pneumoconiosis, Director's Exhibit 12, and later provided a positive rehabilitative reading, Claimant's Exhibit 1, Dr. Scatarige, also dually qualified, interpreted this x-ray as negative for the disease. Director's Exhibit 13. The administrative law judge acted within his discretion in finding that this x-ray was not positive for the existence of pneumoconiosis. See 20 C.F.R. §718.202(a); *Dixon*, 8 BLR at 1-346. The December 12, 2005, x-ray was interpreted as negative, without contradiction, by Dr. Patel, a Board-certified radiologist. Employer's Exhibit 3.

After noting that the x-rays of record were taken between May 10, 2004 and December 12, 2005, and that two films were negative for pneumoconiosis, while two films were "essentially neutral, based on the equivalent qualifications of the interpreting physicians," the administrative law judge permissibly found that the x-ray evidence of record was insufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). Decision and Order at 5; see *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). As substantial evidence supports the administrative law judge's findings pursuant to Section 718.202(a)(1), they are affirmed.

At Section 718.202(a)(2), the administrative law judge determined that the miner underwent a transbronchial lung biopsy of the left upper lobe on February 22, 2006. Director's Exhibit 9; Decision and Order at 5. Dr. Mejia prepared a biopsy report dated March 3, 2006, and diagnosed large cell carcinoma by gross description of the tissue, but did not provide a microscopic description. Director's Exhibit 9. On May 11, 2007, Dr. Caffrey, a Board-certified pathologist, provided a microscopic interpretation of the pathology slides, finding "no distinct lesions of coal workers' pneumoconiosis," but did not provide a gross description of the tissue. As 20 C.F.R. §718.106(a) requires that a biopsy report include both a detailed gross macroscopic and microscopic description of the lungs, the administrative law judge found that neither of the reports met the regulatory requirements, and thus, could not be used to support a finding of pneumoconiosis. Decision and Order at 5.

The Board has held that a biopsy slide review can be in substantial compliance with Section 718.106, even if it does not include a gross macroscopic description of the tissue samples. *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78 (2008). Any error committed by the administrative law judge, however, is harmless, as he further correctly found that neither Dr. Caffrey nor Dr. Mejia made a pathological diagnosis of pneumoconiosis. Decision and Order at 5, n.5. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2).

As the record was devoid of evidence that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and the presumptions set forth at 20 C.F.R. §§718.305 and 718.306 are inapplicable because this claim was filed after June 30, 1982, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). Decision and Order at 3.

At Section 718.202(a)(4), the administrative law judge accurately summarized the medical opinions of Drs. Doddabele, Alam, Caffrey, and Castle. Decision and Order at 5-7. The administrative law judge determined that, while Dr. Doddabele was an oncologist who treated the miner for lung cancer, the physician's underlying documentation was inadequate to support his conclusion that the miner had severe chronic obstructive pulmonary disease (COPD) and pneumoconiosis, as Dr. Doddabele merely referenced these conditions "by history," but did not provide a separate diagnosis of clinical or legal pneumoconiosis as defined at 20 C.F.R. §718.201, or identify any medical testing that would lead to such a diagnosis. Decision and Order at 5; Director's Exhibit 12. Thus, the administrative law judge permissibly found that Dr. Doddabele's opinion was not well-reasoned or documented, and was entitled to no weight. Decision and Order at 6-7; see *Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Similarly, the administrative law judge acted within his discretion in finding that Dr. Alam's diagnosis of pneumoconiosis lacked documentation and reasoning, and therefore was entitled to no weight, as the doctor failed to explain the basis for his conclusions,<sup>6</sup> and provided no underlying documentation in support thereof.<sup>7</sup> *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22; Decision and Order at 6. Because Dr. Caffrey's opinion, that there was no objective evidence of coal workers' pneumoconiosis, was based on specific observations, data, and findings from the doctor's review of the biopsy slides and the miner's medical records, the administrative law judge found the opinion to be well-reasoned and

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<sup>6</sup> The administrative law judge additionally noted that Dr. Alam referenced twenty-eight years of coal mine employment, when the administrative law judge credited the miner with twenty-two years, four months of coal mine employment. Decision and Order at 6; Claimant's Exhibit 3. Further, while Dr. Alam referenced a history of smoking, the administrative law judge determined that "there is nothing to show that he fully appreciated Miner's 40 pack-year smoking history." Decision and Order at 6.

<sup>7</sup> The administrative law judge properly did not consider Dr. Alam's pulmonary evaluation of the miner, conducted on behalf of the Department of Labor in the miner's claim, because the report was not designated as evidence in the survivor's claim. Decision and Order at 6 n. 6. See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240-242 (2007)(*en banc*).

documented on the issue of clinical pneumoconiosis, and entitled to “some weight.” Decision and Order at 6-7. The administrative law judge also credited Dr. Castle’s opinion, that the miner did not have clinical or legal pneumoconiosis, as well-reasoned and documented because the doctor explained how the detailed information from the miner’s medical records supported his conclusions. Decision and Order at 7; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Thus, the administrative law judge permissibly concluded that the weight of the medical opinions of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). *Id.*

Lastly, pursuant to 20 C.F.R. §718.107, claimant may establish the existence of pneumoconiosis based on other evidence not specifically provided for in 20 C.F.R. §718.202(a). The administrative law judge reviewed the CT scan interpretations of record, and determined that, pursuant to 20 C.F.R. §718.107(b), they were medically acceptable and relevant to establishing or refuting claimant’s entitlement to benefits. However, as none of the five interpretations diagnosed pneumoconiosis, we affirm the administrative law judge’s finding that the CT scan evidence of record was insufficient to establish the existence of pneumoconiosis. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff’d on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); Decision and Order at 8; Director’s Exhibit 13, Employer’s Exhibit 8. Further, while the miner’s medical records referenced a “history” of COPD and/or pneumoconiosis, the administrative law judge rationally concluded that these records did not support a finding of pneumoconiosis, as they did not provide the source of, or include an explanation for, any such diagnosis. Decision and Order at 9; Director’s Exhibits 10, 13. Similarly, while the death certificate was signed by Dr. Doddabele, and listed the immediate cause of death as “acute respiratory failure due to COPD exacerbation, terminal metastatic non-small cell cancer, and coal workers’ pneumoconiosis,” the administrative law judge determined that the certificate was “apparently based on history related by the Claimant and not a reasoned diagnosis.” Decision and Order at 8. Consequently, the administrative law judge properly found that the death certificate was insufficient to meet claimant’s burden, especially since no autopsy had been performed. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263; *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-21 (3d Cir. 1997).

As substantial evidence supports the administrative law judge’s finding that the weight of all probative evidence was insufficient to establish the existence of pneumoconiosis at Sections 718.202(a)(1)-(4) and 718.107, it is affirmed. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Consequently, claimant is precluded from entitlement to benefits. *See Trumbo*, 17 BLR at 1-88.

Accordingly, the administrative law judge's Decision and Order Denying 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