

BRB No. 02-0697 BLA

GABRIELE MITSCH WATSON)
(Widow of WILLIE WATSON))
)
Claimant-Petitioner)
)
v.)
)
HUNTER MINING, INCORPORATED) DATE ISSUED:
)
and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
Employer/Carrier-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Gabriele Mitsch Watson, Printer, Kentucky, *pro se*.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow and without the assistance of counsel,¹ appeals the Decision and Order (2001-BLA-01055) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal

¹Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. The Board acknowledged this appeal on July 12, 2002, stating that the case would be reviewed under the general standard of review.

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge noted that the this claim was a request for modification and that the parties had stipulated to twenty-one years of qualifying coal mine employment. Decision and Order at 2-4; Hearing Transcript at 6. The administrative law judge, based on the date of filing, considered entitlement in this survivor's claim pursuant to 20 C.F.R. Part 718.³ Decision and Order at 5. The administrative law judge, after considering all of the evidence of record, concluded that claimant failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205. Decision and Order at 7-14. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not responded in the this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

²The 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.

³Claimant is Gabriele Mitsch Watson, the miner's widow. Claimant filed her claim for benefits on May 29, 1996, which was finally denied by the district director on September 18, 1996 as claimant failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Director's Exhibits 1, 34. Claimant requested modification on May 26, 1997, which was ultimately denied on July 6, 1999. Director's Exhibits 35, 37, 42. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 41, 63.

In an appeal filed by a claimant 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).⁴

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, the administrative law judge considered the merits of the claim without making a preliminary determination that claimant established a change in condition or a mistake in the determination of fact pursuant to 20 C.F.R. §725.310 (2000) as this case involves a request for modification of a prior denial of benefits by the district director. See *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); Director's Exhibits 35, 37, 42; Decision and Order at 2, 7-14.

With respect to the merits, the administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge rationally found that the evidence of record was

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. See Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the preponderance of x-ray readings by physicians with superior qualifications was negative. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibits 21-27, 29, 30, 32, 38, 40, 45-47, 50-56; Decision and Order at 7-8. We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Further, 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)(2) since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 8. Additionally, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein are applicable to the this claim.⁵ *See* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 8.

In determining if the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach, supra*; *Trumbo, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; Decision and Order at 9-12. The administrative law judge acted within his discretion, as fact-finder, in according greater weight to the opinion of Dr. Dahhan, as supported by the reasoned and documented opinions of Drs. Vuskovich and Jarboe, than to the remaining medical opinion evidence, as the physician offered a well reasoned and documented opinion which is supported by the objective laboratory data of record and in light of his superior qualifications. *See Griffith, supra*; *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Back v. Director, OWCP*, 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986); *Collins,*

⁵The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because she filed her claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, the presumption at 20 C.F.R. §718.306 is also inapplicable as the miner died after March 1, 1978. *See* Director's Exhibits 44, 65.

supra; *Worhach, supra*; *Trumbo, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens, supra*; *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Kuchwara, supra*; Decision and Order at 9-12; Director's Exhibits 16-20, 38, 48, 49. We therefore affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law.

With respect to 20 C.F.R. §718.205, the administrative law judge rationally concluded that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. *See Griffith, supra*; *Brown, supra*; *Trumbo, supra*; *Kuchwara, supra*. The relevant evidence of record concerning the cause of death consists of an original and a revised death certificate. The revised death certificate dated September 27, 1996, signed by the Floyd County Coroner, Roger Nelson, listed the cause of death as cardiac arrest due to acute myocardial infarction due to coal workers' pneumoconiosis due to twenty-one years of coal mine employment.⁶ Director's Exhibit 65. The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 as Mr. Nelson is not a physician, he did not perform an autopsy or examine any medical evidence and was unable to substantiate the miner's treatment for black lung. *See Griffith, supra*; *Brown, supra*; *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Clark, supra*; *Tackett v. Cargo Mining Coal Co.*, 12 BLR 1-11 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Dillon, supra*; *Hutchens, supra*; *Kuchwara, supra*; Director's Exhibits 44, 65; Decision and Order at 13-14.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trumbo, supra*; *Haduck, supra*; *Boyd, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found that the evidence of record in this survivor's claim is insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra*; *Haduck, supra*; *Boyd, supra*. The administrative law judge is empowered to weigh the medical evidence and to

⁶The original death certificate, signed on June 3, 1996, by Mr. Roger Nelson, listed the cause of death as cardiac arrest due to acute myocardial infarction. Director's Exhibit 44.

draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to Sections 718.202 and 718.205 as they are supported by substantial evidence and are in accordance with law. *See Griffith, supra; Brown, supra; Neeley, supra; Trumbo, supra.*

Because claimant has failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis, requisite elements of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Griffith, supra; Brown, supra; Trumbo, supra; Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits in this survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge