

BRB Nos. 08-0566 BLA
and 09-0402 BLA

P.J.C.)
(Widow of T.C.))
)
Claimant-Petitioner)
)
v.)
)
WOLF CREEK COLLIERIES)
)
and)
) DATE ISSUED: 04/23/2009
ZIEGLER COAL HOLDING 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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2004-BLA-6109 and 2004-BLA-6562) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent miner’s claim and on a survivor’s claim 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 The administrative law judge credited the miner with nine years of coal mine employment, based on a stipulation by the parties, and adjudicated both claims pursuant to 20 C.F.R. Part 718. With respect to the miner’s claim, the administrative law judge found that the newly submitted evidence was insufficient to establish that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge determined that the evidence was insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) and denied benefits in the miner’s claim. With respect to the survivor’s claim, the administrative law judge determined that claimant did not prove that the miner had pneumoconiosis and was unable to establish, therefore, that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor’s claim.

¹ The miner filed a claim for benefits on September 22, 1987, which was finally denied by Administrative Law Judge Daniel J. Roketenetz on January 23, 1991, because the miner failed to establish the existence of pneumoconiosis. Director’s Exhibit 1. The Board affirmed Judge Roketenetz’s denial of benefits. [*T.C.*] *v. Peter Cave Coal Co.*, BRB No. 91-0873 BLA (Jan. 29, 1992) (unpub.); Director’s Exhibit 1. The miner took no further action until he filed the present subsequent claim on June 4, 2002. Director’s Exhibit 3. While his claim was pending, the miner died on November 25, 2002. Director’s Exhibit 31. Claimant, the miner’s widow, filed a survivor’s claim for benefits on February 5, 2003. Director’s Exhibit 27. These claims were consolidated for a formal hearing before Administrative Law Judge Thomas F. Phalen, Jr. We have consolidated, for decision, claimant’s appeals of the denials of benefits in the miner’s claim and the survivor’s claim.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4).² Employer/carrier has not responded to this appeal.³ The Director, Office of Workers' Compensation Programs, responds in support of the denial of benefits in both claims.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) in both the miner's claim and the survivor's claim. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 12-13.

³ In addressing the designation of the responsible operator in his Decision and Order, the administrative law judge noted that the district director identified Wolf Creek Collieries as the responsible operator. Decision and Order at 4; Director's Exhibits 13a, 34a. The administrative law judge also indicated that Administrative Law Judge Larry Price issued an Order Regarding Designation of Responsible Operator on October 20, 2005, in which he determined that Massey Energy Company, Peter Cave Coal Mining Company's former corporate parent, is not a party to this claim, and declined to disturb the district director's designation of Wolf Creek Collieries as the responsible operator. Decision and Order at 4; Administrative Law Judge Exhibit 2. Based upon a review of the record and employer's failure to appear at the hearing and to present evidence contesting the district director's findings, the administrative law judge found that Wolf Creek Collieries was properly designated as the responsible operator in this case. Decision and Order at 4. In his Brief in this appeal, the Director, Office of Workers' Compensation Programs (the Director), notes that although employer accepted its liability as the responsible operator and defended both the miner's claim and the survivor's claim on the merits at the district director level, subsequent to employer's dissolution in bankruptcy, no appearance for employer was entered before the administrative law judge or the Board. The Director further indicates that he is responding to claimant's appeal in light of the potential liability of the Black Lung Disability Trust Fund, even though, in his view, employer remains liable for any award of benefits. Director's Brief at 1 n.1.

⁴ Because the miner's coal mine employment was in Kentucky, 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*); Director's Exhibit 1, 4.

Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner’s Claim

In order to establish entitlement to benefits in the miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that the miner’s pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to 20 C.F.R. §725.309(d), when a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). In his consideration of the claim at 20 C.F.R. §725.309, the administrative law judge found that “Judge Roketenetz determined that [the miner] did not satisfy any of the elements of entitlement” in his first claim. Decision and Order at 12. A review of the record reveals that, in the miner’s prior claim, Judge Roketenetz did not consider whether the miner was totally disabled, but denied the claim because the miner failed to establish that he had pneumoconiosis. Director’s Exhibit 1. Consequently, claimant was required to submit new medical evidence establishing the existence of pneumoconiosis in order for the administrative law judge to consider the merits of the miner’s claim. 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*), *vac’d and remanded on other grounds*, *Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008)

Claimant contends that the administrative law judge erred in finding that pneumoconiosis was not established by the medical opinion evidence at 20 C.F.R. §718.202(a)(4), asserting that the administrative law judge: 1) should have accorded controlling weight to the opinion of Dr. Kousa, who was the miner’s treating physician at the time of his death; 2) incorrectly determined that the treatment records did not mention pneumoconiosis; and 3) erred in discounting the opinions of Drs. Sundaram, Ortiz, Hyden and Twyman, who treated the miner during his lifetime. Claimant’s Brief at 9-11. Claimant’s arguments are without merit.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the newly submitted evidence of record, consisting of the medical reports of Drs. Ranavaya and Kousa, the miner's hospitalization records and treatment notes by Drs. Sundaram, Ortiz, Hyden and Twyman, and the miner's death certificate.⁵ Dr. Ranavaya, who conducted a physical examination of the miner for the Department of Labor on October 3, 2002, diagnosed chronic bronchitis and opined that this condition was unrelated to coal mine employment, but could be due to smoking. Director's Exhibit 8. Dr. Kousa, the miner's treating physician, in response to a questionnaire dated January 11, 2007, indicated that the miner had an occupational lung disease due to coal mine employment based on "chest x-rays." Claimant's Exhibit 1. Dr. Kousa prepared the miner's death certificate and identified the causes of death as acute respiratory failure, metastatic lung carcinoma and pneumoconiosis. Director's Exhibit 31.

Pursuant to 20 C.F.R. §718.104(d), in considering the opinion of a treating physician, the administrative law "shall take into consideration" the nature and duration of the relationship between the miner and the physician, and the frequency and extent of the treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight given to a treating physician "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). Moreover, the United States Court of Appeals for the Sixth Circuit has recognized that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003).

In this case, the administrative law judge acknowledged that "Dr. Kousa supervised most of [the miner's] hospital admissions over the last two years of his life, and he authored nine discharge summaries found in the hospitalization records." Decision and Order at 14. The administrative law judge determined, however, that Dr. Kousa did not provide a sufficiently reasoned and documented opinion to support a finding that the miner had pneumoconiosis. Decision and Order at 14-15. Contrary to claimant's arguments, therefore, the administrative law judge properly considered Dr. Kousa's status as the miner's treating physician, but permissibly accorded his opinion little weight because the physician provided no documentation, other than an unspecified x-ray, or explanation for his opinion that the miner had pneumoconiosis. See 20 C.F.R.

⁵ The administrative law judge set forth a detailed summary of the miner's treatment and hospital records, which pertain to treatment that the miner received for pulmonary, cardiac and cancer-related conditions between January 14, 1987 and November 26, 2002. Decision and Order at 7-9; Director's Exhibits 32, 35.

§718.104(d)(5); *Williams*, 338 F.3d at 513, 22 BLR at 2-647; Decision and Order at 14-15. Claimant's specifically asserts that the administrative law judge statement that "none of the treatment records mention pneumoconiosis," mischaracterizes the evidence. Claimant's Brief at 9-10, *quoting* Decision and Order at 14. In analyzing the probative value of Dr. Kousa's diagnosis of pneumoconiosis, the administrative law judge stated that he did not find the opinion to be well-reasoned or documented because "[f]irst, none of the hospitalization records mention the possibility of pneumoconiosis, and none note any coal dust exposure. The first time *Dr. Kousa* even mentions pneumoconiosis is in the death certificate and there is absolutely no discussion as to the evidence *he* used to support such a conclusion." Decision and Order at 14-15 (emphasis added); *see* Director's Exhibit 31. A review of the record indicates that the administrative law judge was specifically referring only to the treatment notes and hospital discharge summaries authored by Dr. Kousa, rather than to the treatment records as a whole, as claimant asserts. Thus, we affirm the administrative law judge's decision to accord Dr. Kousa's opinion little weight at 20 C.F.R. §718.202(a)(4). *Williams*, 338 F.3d at 513, 22 BLR at 2-647; Decision and Order at 15..

Similarly, we reject claimant's contention that the administrative law judge erred in failing to find the diagnoses of pneumoconiosis contained in the treatment records prepared by Drs. Sundaram, Ortiz, Hyden and Twyman to be sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant's Brief at 10. The administrative law judge found that Dr. Sundaram's diagnosis of pneumoconiosis was entitled to little weight because: 1) it was merely a restatement of the x-rays; 2) there was no explanation as to how his physical examination findings and the [blood gas studies] supported the diagnosis; and 3) he did not consider the miner's smoking history when reaching his conclusion. Decision and Order at 15. With respect to the opinions of Drs. Ortiz, Hyden and Twyman, the administrative law judge found that:

Dr. Ortiz conducted a physical examination in 1994 and concluded that [the miner] suffered from pneumoconiosis. Dr. Hyden diagnosed pneumoconiosis based on history, an x-ray, symptomatology, and [arterial blood gas studies]. Dr. Twyman diagnosed pneumoconiosis based on history. Similar to Dr. Sundaram, none of these physicians provided an explanation as to how their observations support a finding on pneumoconiosis. As a result, I find their opinions insufficiently reasoned or documented to support a diagnosis of the disease. Therefore, I accord their opinions little weight.

Id. (citations omitted). The administrative law judge acted within his discretion in according little weight to the opinions of Drs. Sundaram, Ortiz, Hyden and Twyman since these physicians did not offer reasoned explanations "as to how their observations support[ed] a finding of pneumoconiosis," or provide documented opinions for their

diagnoses that the miner had pneumoconiosis. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 15; Director's Exhibits 32, 35.

It is within the purview of the administrative law judge to weigh the medical evidence, draw inferences therefrom, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR at 1-151. The administrative law judge has discretion to resolve the conflicting evidence and is given deference with regard to credibility determinations. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, we affirm the administrative law judge's finding that claimant failed to establish that the miner suffered from pneumoconiosis at 20 C.F.R. §718.202(a)(4), as it is supported by substantial evidence. We further affirm the administrative law judge's finding that the miner did not have pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Because claimant failed to establish the existence of pneumoconiosis, we affirm the administrative law judge's determination that the relevant evidence does not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and his finding that an award of benefits in the miner's claim is precluded. *White*, 23 BLR at 1-3.

The Survivor's Claim

In order 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 suffered from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor

leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 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*, 11 BLR at 1-27.

With regard to the survivor's claim, as with the miner's claim, claimant contends that the administrative law judge erred in failing to find that the medical opinions of Drs. Kousa, Sundaram, Ortiz, Hyden and Twyman established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We disagree. In his consideration of the survivor's claim, the administrative law judge first addressed whether the evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 16. The administrative law judge applied the credibility findings he made in the miner's claim with respect to the x-ray and medical opinion evidence that was also in the record in the survivor's claim. For the reasons set forth in our consideration of claimant's appeal of the denial of benefits in the miner's claim, we affirm the administrative law judge's determination to assign less weight to the diagnoses of pneumoconiosis provided by Drs. Kousa, Sundaram, Ortiz, Hyden and Twyman pursuant to 20 C.F.R. §718.202(a)(4). See slip op. at 6-7. We also affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) in the survivor's claim.

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 20 C.F.R. §718.205(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we also affirm the administrative law judge's finding that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 18. We therefore affirm the denial of benefits in the survivor's claim. See *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the Decision and Order – Denial of Benefits in the miner’s claim and the survivor’s claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge