

BRB No. 11-0496 BLA

LINDA LOU COUCH)	
(Widow of GORDON COUCH))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY,)	DATE ISSUED: 04/25/2012
INCORPORATED)	
)	
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 Request for Modification of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Request for Modification (2008-BLA-05475) of Administrative Law Judge Robert B. Rae rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

¹ Claimant is the widow of the miner, who died on January 7, 2002. Director's Exhibit 10.

944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).² The administrative law judge initially noted that this case involves claimant's request for modification of the denial of her February 14, 2002 claim.³ The administrative law judge credited the miner with thirty-two years of qualifying coal mine employment, and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. Noting that modification can only be established in a survivor's claim by establishing that a mistake in a determination of fact was made in the prior decision, the administrative law judge considered the evidence submitted with the original claim, as well as the new evidence submitted with claimant's modification request. The administrative law judge found that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In light of that finding, the administrative law judge found that claimant could not establish entitlement to benefits. Accordingly, the administrative law judge denied benefits.

On appeal, 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) and (4).⁴ Claimant also contends that the administrative law judge erred in finding that pneumoconiosis was not an underlying cause of the miner's death pursuant to 20 C.F.R. §718.205(c). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the survivor's claim was filed prior to January 1, 2005. *See* Pub. L. No. 111-148, §1556(c); Director's Exhibit 3.

³ In a Decision and Order issued on February 16, 2006, Administrative Law Judge Daniel J. Roketenetz found that the evidence was insufficient to establish the existence of pneumoconiosis and, therefore, that claimant was unable to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(c). Accordingly, Judge Roketenetz denied benefits. Director's Exhibit 50. The Board affirmed Judge Roketenetz's Decision and Order on February 16, 2007. *Couch v. Shamrock Coal Co.*, BRB No. 06-0475 BLA (Feb. 16, 2007)(unpub.); Director's Exhibit 62. On August 16, 2007, claimant sent new evidence to the Office of Workers' Compensation Programs, which treated the evidence as claimant's request for modification. Director's Exhibits 65, 66.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.⁵ 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).

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 survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *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).

In order to be entitled to modification in a case involving a survivor's claim, claimant must establish that the prior denial contained a mistake in a determination of fact. 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-231, 18 BLR 2-290, 2-294 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, because claimant's prior claim was denied because she failed to establish that the miner had pneumoconiosis, claimant is required to prove that the prior denial contained a mistake in a determination of fact on that issue, in order to proceed on the merits of her claim. 20 C.F.R. §725.310; *Wojtowicz*, 12 BLR at 1-164.

Claimant argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis by relying almost solely on the interpretations of the readers with superior qualifications,

⁵ As the miner was last employed in the coal mining industry in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 4.

and by relying on the “numerical superiority” of certain x-ray interpretations. Claimant also contends that the administrative law judge “may have selectively analyzed” the x-ray evidence, which he may not do. These contentions are without merit.

The administrative law judge reviewed the x-ray interpretations of record, finding that the only x-ray evidence considered in the prior decision was contained in the miner’s Veterans Administration treatment records. The administrative law judge found, however, that none of the interpretations contained in those records supported a finding of coal workers’ pneumoconiosis.⁶ Decision and Order at 5; Claimant’s Exhibit 5. The administrative law judge then considered the x-ray readings submitted with claimant’s modification request, which included five rereadings of three x-ray films contained in the miner’s treatment records. The first x-ray, dated March 6, 2001, was read as positive by Dr. Alexander, a B reader and Board-certified radiologist, but was also read as negative by Dr. Wiot, a B reader and Board-certified radiologist. Director’s Exhibit 63; Employer’s Exhibit 3. Similarly, the November 6, 2001 x-ray was read as positive for pneumoconiosis by Dr. Alexander and as negative for pneumoconiosis by Dr. Wiot. Director’s Exhibit 63; Employer’s Exhibit 2. The November 29, 2001 x-ray was also read by Dr. Wiot as negative for pneumoconiosis. Employer’s Exhibit 1.

Weighing these x-ray interpretations, in conjunction with the qualifications of the readers, the administrative law judge determined that the preponderance of the x-ray evidence was negative for pneumoconiosis, as the readings of two of the x-ray films were in equipoise and the third film was read only as negative. Decision and Order at 6. Contrary to claimant’s assertion, therefore, the record reflects that the administrative law judge based his finding upon a proper quantitative and qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant’s arguments that the administrative law judge improperly relied solely on the readers’ credentials, that he merely counted the negative readings, and that he “may have selectively analyzed” the x-ray readings, lack merit. Therefore, 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), as it is rational and supported by substantial evidence.

⁶ These x-rays, taken from 1997 to 2001, were not taken for the purpose of diagnosing coal workers’ pneumoconiosis, and diagnosed pneumonia, granulomatous changes and emphysema. *See* Decision and Order at 5; *Couch*, BRB No. 06-0475 BLA, slip op. at 3.

In challenging the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in finding that the reasoned medical opinions of record failed to establish the existence of pneumoconiosis. Specifically, claimant asserts that the administrative law judge erred in failing to accord dispositive weight to the opinion of the miner's treating physician, Dr. Spady. Claimant contends that Dr. Spady diagnosed and treated the miner for chronic obstructive pulmonary disease (COPD) related to coal mine employment and coal workers' pneumoconiosis, and therefore, that his opinions support a finding that the miner suffered from pneumoconiosis. Claimant also asserts that opinions contained in the miner's treatment records from the Lexington Clinic and the Veterans Administration Hospital establish that the miner suffered from coal workers' pneumoconiosis. Claimant contends that, because these opinions were based on the miner's history, a physical examination and symptoms, they are well-reasoned and the administrative law judge erred in rejecting them. Further, claimant contends that the award of benefits from the Social Security Administration, finding the miner totally disabled and unable to work around pulmonary irritants, supports a finding of pneumoconiosis. These contentions lack merit.

With regard to Dr. Spady's opinions, we reject claimant's contention that the administrative law judge erred in not according them dispositive weight, in light of Dr. Spady's status as the miner's treating physician. Contrary to claimant's contentions, in considering the opinions of Dr. Spady, the administrative law judge acknowledged that Dr. Spady was one of the miner's treating physicians, but nonetheless found that neither of his opinions was supported by the medical record. Decision and Order at 8. Specifically, the administrative law judge found that the treatment records associated with Dr. Spady's opinions did not provide sufficient objective support for his opinions, that the opinions were equivocal, and that Dr. Spady did not have an accurate picture of the miner's coal mine employment history. *Id.* Consequently, because a treating physician's opinion must be reasoned and persuasive in order to be credited, the administrative law judge rationally found that Dr. Spady's opinions were entitled to little weight, as they were equivocal and unreasoned. 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003)(opinions of treating physicians get the deference they deserve based on their power to persuade); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(recon. en banc); Decision and Order at 8; Director's Exhibit 16; Claimant's Exhibits 1, 2.

Further, contrary to claimant's assertion, the administrative law judge permissibly found the treatment records from the Veterans Administration Hospital and Lexington Clinic did not support claimant's burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as the reports of the physicians contained therein did not provide any explanation of the bases for their conclusions or any objective medical

testing to support their diagnoses. Decision and Order at 8; Claimant's Exhibits 4, 5. Specifically, the administrative law judge found that, while the treatment records contained notations that refer to a "history" of black lung disease and pneumoconiosis, they lack any credible medical opinions that support that diagnosis.⁷ *Id.* The administrative law judge, therefore, properly found that these notations are not well-reasoned or well-documented medical opinions supportive of a diagnosis of pneumoconiosis. See *Williams*, 338 F.3d at 513, 22 BLR at 2-648-49; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); Decision and Order at 8, 9.

Finally, contrary to claimant's contention, the administrative law judge properly found that, while the Decision and Order of the Social Security Administration contained a determination of total disability due, in part, to pneumoconiosis, he was not bound by that decision. *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); Decision and Order at 9. Because claimant does not otherwise allege any error in the administrative law judge's weighing of the medical opinion evidence,⁸ we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

In light of our affirmance of the administrative law judge's findings under Section 718.202(a), we also affirm the administrative law judge's determination that claimant has not established a mistake in a determination of fact in the prior denial of her claim for survivor's benefits pursuant to Section 725.310. We must, therefore, affirm the administrative law judge's denial of benefits.⁹ 20 C.F.R. §725.310; *Worrell*, 27 F.3d at 230-231, 18 BLR at 2-294; *Wojtowicz*, 12 BLR at 1-164.

⁷ The administrative law judge stated that "it appears that the [c]laimant, the miner or other members of his family provided a verbal 'medical history' upon admission to the hospital emergency rooms and that these notations reflect that input." Decision and Order at 8; Claimant's Exhibits 4, 5.

⁸ The record also contains the opinions of Drs. Rosenberg, Tomashefski and Vuskovich, each of whom opined that the miner did not suffer from pneumoconiosis. Director's Exhibits 17, 42, 43; Employer's Exhibits 5, 6.

⁹ As claimant has failed to establish the existence of pneumoconiosis, see 20 C.F.R. §718.201, a requisite element of entitlement in this survivor's claim, we need not address claimant's assertions pursuant to 20 C.F.R. §718.205. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge