

BRB No. 98-1025 BLA

CORA LEA McCOY)
(Widow of BOBBY B. McCOY))
))
Claimant-Petitioner)
))
v.)
))
DOTCO ENERGY COMPANY, INC.)
))
Employer-Respondent)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
STATES DEPARTMENT OF LABOR)
))
Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Cora Lea McCoy, McCarr, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

BEFORE: HALL, Chief Administrative Appeals Judge, SMITH, and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals from the Decision and Order - Denying Benefits (93-BLA-0787) of Administrative Law Judge Rudolf L. Jansen with respect to a survivor's claim 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).¹ In response to a written request submitted by Susie Davis, a lay representative acting on claimant's behalf, the

¹Claimant is the surviving spouse of miner Bobby B. McCoy. Mr. McCoy died on October 25, 1990. Director's Exhibit 7. On the death certificate, Dr. Vacek identified coronary artery disease, ischemic cardiomyopathy, and recent myocardial infarction as the causes of death. *Id.*

administrative law judge issued an order in which he canceled the scheduled hearing and stated that the case would be decided on the record. Claimant, in a subsequent letter, asked the administrative law judge to reschedule the hearing, indicating that she did not authorize Ms. Davis to request cancellation of the hearing. The administrative law judge denied claimant's request on the ground that the claim had been on the dockets of seven different administrative law judges and hearings had been scheduled and then canceled on nine previous occasions.

In his Decision and Order, the administrative law judge determined that the miner had 14.5 years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718.² The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Employer has responded to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal by a claimant filed 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed 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 substantial 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 had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the present case arises, has held that, for the purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing

²The miner filed an application for benefits on June 27, 1984. Director's Exhibit 24. This claim was finally denied by the district director on December 18, 1984. *Id.* The miner took no further action with respect to this claim.

cause of the miner's death where pneumoconiosis actually hastens death. *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

As an initial matter, we hold that the administrative law judge acted within his discretion in denying claimant's request to reschedule the hearing with respect to her claim. As indicated by the administrative law judge, the record reflects that scheduled hearings were canceled at the behest of claimant or her representative on at least four prior occasions. In addition, the primary concern addressed in claimant's letter to the administrative law judge was claimant's apparent fear that cancellation of the hearing meant that her claim, and the evidence that she proffered in support of it, would not be considered by the administrative law judge. The administrative law judge's determination that he would decide the case based upon the record did not deprive claimant in the manner suggested in her letter, inasmuch as the administrative law judge fully considered the merits of her claim in light of a weighing of all of the evidence of record, including the evidence submitted by claimant. Moreover, because the present case involves a survivor's claim filed after January 1, 1982, which requires that the existence of pneumoconiosis and death due to pneumoconiosis be established by medical evidence, *see* 20 C.F.R. §§718.202(a), 718.205(c), the administrative law judge's disposition of the claim did not depend upon an assessment of testimony offered by claimant or other lay witnesses at a hearing. Based upon the circumstances present in this case, therefore, the administrative law judge did not abuse the broad discretion afforded him in resolving procedural issues when he denied claimant's request to reschedule the hearing with respect to her claim. *See Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986).

Turning to the merits of the case, we affirm the administrative law judge's determination that the evidence of record does not support a finding of pneumoconiosis under Section 718.202(a)(1)-(4). With respect to Section 718.202(a)(1), the administrative law judge rationally found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, as all of the interpretations offered by physicians qualified as B readers and/or Board-certified radiologists are negative for the disease. Decision and Order at 14; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge also determined correctly that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2), as the record does not contain any biopsy or autopsy evidence. Decision and Order at 14; 20 C.F.R. §718.202(a)(2). Regarding Section 718.202(a)(3), the administrative law judge properly found that the presumptions set forth in 20 C.F.R. §§718.304-306 are not available to claimant on the grounds that the relevant claim was filed after January 1, 1982, the miner died after March 1, 1978, and the record did not contain any evidence of complicated pneumoconiosis. Decision and Order at 15; 20 C.F.R. §§718.202(a)(3), 718.304-306. Thus, the administrative law judge rationally concluded that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). *Id.*

With respect to Section 718.202(a)(4), the administrative law judge considered the opinions in which Drs. Page, Penman, Modi, Vacek, Varney, and Clarke diagnosed

pneumoconiosis and the medical opinions in which Drs. Anderson, Lane, Broudy, Fino, and Branscomb concluded that the miner did not suffer from the disease as defined in 20 C.F.R. §718.201. The administrative law judge acted within his discretion in finding that Dr. Page's report was not adequately documented or reasoned, as the sole basis identified by the physician for his diagnosis of pneumoconiosis was a positive x-ray reading. Decision and Order at 16; Director's Exhibit 9; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge also rationally determined that the opinions of Drs. Modi and Varney were entitled to little weight on the ground that neither physician discussed the significance of the miner's extensive history of cigarette use. Decision and Order at 16; *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). The administrative law judge acted within his discretion in discrediting Dr. Vacek's diagnosis of pneumoconiosis, inasmuch as the doctor admitted at his deposition that he relied upon the opinions of other physicians in rendering his diagnosis and, therefore, did not render an independent conclusion as to the existence of the disease. Decision and Order at 16; Director's Exhibit 18; Employer's Exhibit 15 at 12; *see Clark, supra*.

The administrative law judge acknowledged that the opinion in which Dr. Clarke diagnosed pneumoconiosis was reasoned and documented, but rationally concluded that it was outweighed by the contrary opinions of Drs. Broudy, Fino, and Branscomb. The administrative law judge acted within his discretion in basing his finding upon the fact that Drs. Broudy, Fino, and Branscomb possessed superior qualifications as physicians who are Board-certified in Internal Medicine and Pulmonary Disease, while Dr. Clarke's qualifications are not of record. Decision and Order at 17; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge also rationally determined that the opinions of Drs. Broudy, Fino, and Branscomb were entitled to greater weight, as the physicians provided more thorough explanations of their conclusions and engaged in more detailed discussions of the miner's smoking and medical histories. Decision and Order at 17; *see Clark, supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, affirm the administrative law judge's finding that the medical opinions of record are insufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4).

Inasmuch as the administrative law judge determined appropriately that claimant did not establish that the miner had pneumoconiosis under Section 718.202(a)(1)-(4), an essential element of entitlement, we must affirm the denial of benefits under Part 718. *See Trumbo, supra*. We need not, therefore, address the administrative law judge's determination that claimant did not demonstrate that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), as error, if any, therein would be harmless.³ *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

³The administrative law judge's finding under 20 C.F.R. §718.205(c) is rational and supported by substantial evidence, as he acted within his discretion in discrediting the opinion of Dr. Vacek, the only physician who suggested that pneumoconiosis

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

hastened the miner's death, on the ground that Dr. Vacek's opinion was stated in equivocal terms and conflicted with the conclusions that he recorded on the death certificate. Decision and Order at 19; see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).