BRB No. 01-0829 BLA

ALICE WOOTON (Widow of DON WOOTON)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
DON WOOTON MINING COMPANY, INCORPORATED	)	
and	)	
OLD REPUBLIC 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

David S. Panzer (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judges, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2000-BLA-0476) of Administrative Law Judge Robert L. Hillyard denying benefits on a miner's duplicate claim and 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 miner, Don Wooton, filed his original claim for black lung benefits on February 2, 1981, which was denied by the district director on March 31, 1981. The miner filed a second claim on February 27, 1986, which was finally denied on October 24, 1988. The miner filed the instant claim on September 6, 1995, and subsequently, on June 29, 1997, while the claim was pending, the miner died.[2] Decision and Order at 3; Director's Exhibits 1, 10. On January 27, 1998, the miner's widow, claimant herein, filed a survivor's claim. Decision and Order at 3; Director's Exhibit 2. Subsequently, both claims were consolidated. The district director denied both claims and the case was referred to the Office of Administrative Law Judges. The administrative law judge credited the miner with fifteen years and nine months of coal mine employment and adjudicated the miner's duplicate claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). The administrative law judge thus found that the

[1]The 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 (2001). All citations to the regulations, unless otherwise noted, are to the amended regulations.

[2]In discussing the procedural history of the miner's claim, the administrative law judge stated that a hearing was held before Administrative Law Judge Daniel J. Roketenetz on June 6, 1997, and that Judge Roketenetz issued a Decision and Order denying benefits on December 30, 1997. Decision and Order at 3; *see* Director's Exhibit 52. The administrative law judge also stated that the denial was appealed to the Board on February 3, 1998, but that neither the hearing transcript nor the December 30, 1997 Decision and Order were found in the record. Decision and Order at 3; *see* Director's Exhibits 48, 52.

We note that the miner's widow and claimant herein, Alice Wooton, was also engaged in coal mine employment with employer and filed a claim for black lung benefits on her own behalf. That claim was denied by Judge Roketenetz and the denial was affirmed by the Board. The aforementioned proceedings took place in Alice Wooton's individual claim. However, certain documents from that claim were inadvertently included in the record of the consolidated claims of Don Wooton's miner's claim and Alice Wooton's survivor's claim and presumably led to Judge Roketenetz's confusion. Any error on the administrative law judge's part with respect to the procedural history of the instant case, however, is harmless inasmuch as the administrative law judge's mistake did not alter his adjudication of the merits.

newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (1999)[3] in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied in the miner's duplicate claim.

With respect to the survivor's claim, the administrative law judge considered all of the evidence of record and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, benefits were denied on the survivor's claim. On appeal herein, claimant contends that the administrative law judge erred in his evaluation of the x-ray evidence and medical opinions of Drs. Baker, Clarke and Wells in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) and (4) (2000).[4] Claimant also contends that the administrative law judge erred in failing to find that the evidence establishes death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was totally

[3] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

[4] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) (2001) and 718.204(c) (2000), *see* 20 C.F.R. §718.204(b)(2)(i)-(iv) (2001), are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Where 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 there has been a material change in conditions. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against the miner. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then, the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Ross, supra*. In the present case, the administrative law judge determined that the miner's previous claim was denied on the ground that claimant did not establish the presence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Decision and Order at 16-17. The administrative law judge then properly reviewed all of the evidence submitted subsequent to the date of the prior denial to determine whether claimant had proven at least one of the elements of entitlement previously adjudicated against the miner. Decision and Order at 6-19; *Ross, supra*.

After consideration of the administrative law judge's Decision and Order, the arguments of the parties 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. With respect to the miner's claim, the administrative law judge reviewed the newly submitted x-ray readings and correctly found that as all six of the x-ray interpretations submitted since the prior denial were negative for the existence of pneumoconiosis, the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6-7, 17; Director's Exhibits 12-13, Employer's Exhibits 3, 5, 8-9. We, therefore, affirm the administrative law judge's finding pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

In weighing the medical opinions submitted since the previous denial on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), the administrative law judge correctly concluded that this evidence, which consisted of the opinions of Drs. Fino, Branscomb, Broudy, Wicker and Patel, failed to establish the existence of

pneumoconiosis as none of these physicians diagnosed the miner as suffering from pneumoconiosis. Decision and Order at 12-14, 17-18; Director's Exhibits 12, 42, 69; Employer's Exhibits 2-4, 7. We, therefore, affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as it is supported by substantial evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Perry, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985).

Moreover, we reject claimant's allegation that the administrative law judge erred in finding that the newly submitted evidence was insufficient to establish total disability pursuant to Section 718.204(c) (2000). The administrative law judge rationally concluded that the preponderance of the newly submitted evidence was insufficient to establish total disability, as the sole pulmonary function study was non-qualifying, the blood gas study evidence was in equipoise, there was no evidence of cor pulmonale with right sided congestive heart failure and no physician offered an opinion sufficient to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 18-19. Thus, contrary to claimant's assertion, the administrative law judge was not required to address the exertional requirements of claimant's usual coal mine duties .[5] *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge's findings pursuant to Section 718.204(c) are thus supported by substantial evidence and are affirmed. Inasmuch as the administrative law judge properly determined that claimant failed to establish any of the elements of entitlement previously adjudicated against the miner pursuant to Section 725.309(d) (2000), we affirm the administrative law judge's denial of benefits in the miner's claim. *Ross, supra*.

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 1-39 (1988). For

[5]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2) (2000); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). We reject, therefore, claimant's suggestion that such testimony established that he is totally disabled under the Act.

survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if 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 Section 718.304, is applicable. 20 C.F.R §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of 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., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

With respect to the survivor's claim, claimant contends that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge selectively analyzed the evidence, improperly relied on the superior qualifications of the readers that did not interpret the x-rays as positive, and improperly gave greater weight to the numerical superiority of the x-ray readings that were not positive. We disagree. In his consideration of the x-ray evidence, the administrative law judge listed all of the x-ray interpretations of record, which consisted of a total of fifty-six interpretations of eleven x-rays and found that there were forty-nine negative and seven positive x-ray readings. Decision and Order at 19. The administrative law judge noted that thirty-six negative interpretations were by dually qualified physicians who were Board-certified radiologists and B readers and by physicians who were B readers only, while only four positive interpretations were by dually qualified physicians and that the remaining three positive interpretations were made by physicians who possessed no radiological qualifications. *Id.* The administrative law judge thus reasonably found that the preponderance of the x-ray evidence was negative and rationally accorded greater weight to the preponderance of the x-ray interpretations by the readers with superior qualifications in concluding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton*, *supra*; *Edmiston*, *supra*; *Trent*, *supra*; *Roberts*, *supra*; Decision and Order at 19-20. Inasmuch as the administrative law judge weighed all of the x-ray evidence and reasonably concluded that it was insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

We further reject claimant's contention that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to Section 718.202(a)(4). In weighing the medical opinions of record thereunder, the administrative law judge rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Perry*, *supra*. The administrative law judge permissibly accorded greater weight to the medical opinions of Drs. Fino, Branscomb, Broudy and Lane, which stated that the miner did not have pneumoconiosis or any other occupationally acquired pulmonary condition, than to the contrary opinions of Drs. Moore, Clarke, Rader,

Wells and Baker. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 20-21. Contrary to claimant's contention, the administrative law judge, in a rational exercise of discretion as the fact-finder, permissibly concluded that the opinions of the Drs. Baker, Clarke and Wells were flawed as they were based upon inaccurate coal mine employment histories, nonqualifying objective studies and positive chest x-ray evidence, while the administrative law judge found that the overwhelming weight of the x-ray readings failed to establish the existence of pneumoconiosis. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Perry, supra*; *Fuller v. Gibraltar Corp*., 6 BLR 1-1291 (1984); Decision and Order at 20-21. Inasmuch as the administrative law judge rationally concluded that the medical opinion evidence did not establish the existence of pneumoconiosis and his conclusion is supported by substantial evidence, we affirm his finding that the evidence was insufficient to establish the existence of pneumoconiosis. *Clark, supra*; *Perry, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 20-21.

The administrative law judge properly found that the newly submitted evidence, as well as the evidence submitted in connection with the prior denial, failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge correctly found that as none of the physicians attributed the miner's death to pneumoconiosis, claimant failed to establish entitlement to survivor's benefits.[6] We, therefore, affirm the administrative law judge's finding that the medical evidence failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death. 20 C.F.R. §718.205(c); *see Brown, supra*.

The administrative law judge is empowered to weigh the medical evidence and to 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). 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 Trent, supra*; *Perry, supra*; *Oggero, supra*; *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge correctly

[6] Dr. Grigsby, who signed the death certificate, did not indicate that pneumoconiosis caused the miner's death. Director's Exhibit 10. Dr. Fino, Employer's Exhibit 6, Dr. Branscomb, Employer's Exhibit 4, and Dr. Broudy, Employer's Exhibit 7, concluded that pneumoconiosis played no role in the miner's death.

concluded that the evidence does not establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis and because claimant has not met her burden of proof on the essential elements of entitlement in a survivor's claim, we must affirm the denial of benefits. *Brown*, *supra*; *Clark*, *supra*; *Trent*, *supra*; *Perry*, *supra*; *Trumbo*, *supra*; *Neeley*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits on 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

PETER A. GABAUER, Jr.
Administrative Appeals Judge