

BRB No. 07-0142 BLA

J.H. )  
(Widow of D.H.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
RIMROCK MINING, INCORPORATED )  
 )  
and )  
 ) DATE ISSUED: 08/29/2007  
KENTUCKY COAL PRODUCERS' SELF- )  
INSURANCE FUND )  
 )  
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6469) of Administrative Law Judge Richard K. Malamphy denying benefits on 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). The miner died on February 5, 2002, and claimant filed her application for survivor's benefits on April 2, 2002. Director's Exhibits 3, 8. In a decision dated September 14, 2006, the administrative law judge credited the miner with five years of coal mine employment<sup>1</sup> and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and therefore, insufficient to establish 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.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and, consequently, erred in finding that the medical evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.<sup>2</sup>

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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. §718.205(c), 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 survivors' 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

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<sup>1</sup> The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, 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, 1-202 (1989)(*en banc*).

<sup>2</sup> Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.*, 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).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of six interpretations of three x-rays taken on March 22, 1991, April 24, 2001 and September 4, 2001. The administrative law judge properly found that all of the x-ray interpretations of record, including those by the most highly qualified readers, are negative for pneumoconiosis. Decision and Order at 3-4; Director's Exhibits 1, 9, 10.

The administrative law judge permissibly concluded that, based on the absence of positive x-ray readings in the record, claimant failed to meet her burden of proof to establish the existence of pneumoconiosis by x-ray evidence. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 4. Consequently, we reject, as without merit, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he "may have 'selectively analyzed'" the readings. Claimant's Brief at 3. We, therefore, affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant next asserts that the administrative law judge erred in evaluating the medical opinion evidence at 20 C.F.R. §718.202(a)(4). We disagree. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the relevant evidence of record, consisting of the death certificate, numerous treatment notes and hospital records from Dr. Hortillosa, and two medical reports from Dr. Dahhan. Initially, the administrative law judge correctly found that the death certificate, treatment notes and hospital records did not contain any diagnoses of coal workers' pneumoconiosis or any other chronic dust disease or impairment arising out of coal mine employment. Decision and Order at 4-5; Director's Exhibits 8, 9. The administrative law judge further properly found that Dr. Dahhan, who both examined the miner in 1991, and conducted a review of the medical records in 2003, opined that the miner did not have coal workers' pneumoconiosis or any chronic dust disease or impairment arising out of coal mine employment. Decision and Order at 4-5; Director's Exhibit 1; Employer's Exhibit 1.

As the administrative law judge properly concluded that the record contains no medical opinions supportive of a finding of pneumoconiosis, we reject claimant's allegation of error, and affirm the administrative law judge's conclusion that the evidence is insufficient to carry claimant's burden of proof to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Because the administrative law judge properly determined that the record contains no medical evidence supportive of a finding of pneumoconiosis, we affirm the administrative law judge's findings that the miner did not have pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that, therefore, the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge