

BRB No. 98-1429 BLA

PEARL H. HUGHES)
(Widow of DELMAR W. HUGHES))
)
Claimant-Petitioner))
)
v.)
)
CLINCHFIELD COAL COMPANY) DATE ISSUED: 8/20/99
)
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Pearl H. Hughes, Coeburn, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ representing herself, appeals the Decision and Order (97-BLA-1318) of Administrative Law Judge Richard A. Morgan denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹Claimant is the surviving spouse of the deceased miner who died on June 23, 1995. Director's Exhibit 8.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The instant case involves a survivor's claim filed on December 21, 1995.² The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish that the miner's death was due to

²The miner filed a claim on June 21, 1973. Director's Exhibit 24. The Social Security Administration [SSA] denied the claim on July 12, 1973. *Id.* After the miner elected SSA review of his claim, the SSA denied the claim again on May 9, 1979. *Id.* The Department of Labor denied the claim on June 16, 1978. *Id.* There is no indication that the miner took any further action in regard to his 1973 claim.

The miner filed a second claim on January 17, 1984. By Decision and Order dated January 20, 1988, Administrative Law Judge Melvin Warshaw found, *inter alia*, that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Director's Exhibit 24. Judge Warshaw also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). *Id.* Accordingly, Judge Warshaw denied benefits. *Id.* On January 28, 1988, Judge Warshaw issued an Errata Order wherein he noted that a paragraph indicating that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) had been inadvertently omitted from his January 20, 1988 Decision and Order. There is no indication that the miner took any further action in regard to his 1984 duplicate claim.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Boyd, supra*.

In determining whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Of the twenty-eight x-ray interpretations rendered by physicians with these qualifications, only four are positive for pneumoconiosis. Director's Exhibits 19, 24; Employer's Exhibits 4-7. The administrative law judge, therefore, properly found that "an overwhelming number of the best qualified interpreters found the x-rays negative." Decision and Order at 14. The administrative law judge also noted that all of the interpretations of the miner's most recent x-rays, films taken between October 18, 1993 and June 10, 1995, are negative for pneumoconiosis. *Id.*; Director's Exhibits 10, 12, 19; Employer's Exhibits 4-7. Inasmuch as it is supported by substantial evidence, we affirm the

³Claimant filed the instant survivor's claim on December 21, 1995. Director's Exhibit 1.

administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

In his consideration of whether the autopsy evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge noted that while Dr. Tucker, the autopsy prosector, diagnosed pneumoconiosis, his qualifications are not found in the record. Decision and Order at 15; Director's Exhibit 9. The administrative law judge accorded greater weight to the opinions of Drs. Jones, Naeye and Caffrey based upon their superior qualifications.⁴ See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 15. While Dr. Jones diagnosed pneumoconiosis, Claimant's Exhibit 1, Drs. Naeye and Caffrey opined that the miner did not suffer from pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge noted that Drs. Tomashefski and Fino also opined that the miner did not suffer from pneumoconiosis. Decision and Order at 15; Employer's Exhibits 2, 9, 11. The administrative law judge noted that while Dr. Fino is not a pathologist, he is a pulmonary specialist.⁵ Decision and Order at 15. The administrative law judge found that while Dr. Jones' opinion supported a finding of pneumoconiosis, it was outweighed by the contrary opinions of Drs. Naeye, Caffrey, Tomashefski and Fino. *Id.* The administrative law judge, therefore, found that the autopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Id.*

While Dr. Naeye's qualifications are not found in the record, the record indicates that Dr. Tomashefski is a Board-certified pathologist. See Employer's Exhibit 2. Dr. Tomashefski, like Drs. Naeye and Caffrey, found that the autopsy evidence did not reveal the presence of pneumoconiosis. The administrative law judge also noted that Dr. Fino, a physician Board-certified in Internal Medicine and Pulmonary Disease, reviewed the evidence of record, and opined that the miner did not suffer from pneumoconiosis. Inasmuch as a majority of the best qualified pathologists opined that the miner did not suffer from pneumoconiosis, an opinion also supported by Dr. Fino, a Board-certified Internist, we affirm the administrative law judge's finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

⁴Drs. Jones and Caffrey are Board-certified in Anatomical and Clinical Pathology. Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Naeye's qualifications are not found in the record.

⁵Dr. Fino is Board-certified in Internal Medicine and Pulmonary Diseases. Employer's Exhibit 11.

The administrative law judge properly found that the statutory presumptions set out at 20 C.F.R. §718.202(a)(3) are not applicable in the instant case. Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. See 20 C.F.R. §718.304. The Section 718.305 presumption is similarly inapplicable because claimant filed the instant claim after January 1, 1982. See 20 C.F.R. §718.305(e). Finally, inasmuch as the miner died after March 1, 1978, the Section 718.306 presumption is inapplicable. See 20 C.F.R. §718.306.

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge noted that while Drs. Kanwal, Modi, Hess and Fintel diagnosed pneumoconiosis, Drs. Sargent, Fino and Castle did not. Decision and Order at 15; Director's Exhibits 19, 24; Employer's Exhibits 9-11. The administrative law judge properly concluded that Dr. Fino's opinion that the miner did not suffer from pneumoconiosis was entitled to additional weight based upon his superior qualifications.⁶ See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 16; Employer's Exhibits 9-11. The administrative law judge also properly credited the opinions of Drs. Sargent and Fino that the miner did not suffer from pneumoconiosis because he found that they were based upon more comprehensive documentation. See *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); Decision and Order at 16. The administrative law judge also noted that the opinions of Drs. Sargent and Fino were supported by Dr. Castle's opinion. Decision and Order at 16; Employer's Exhibit 10. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁷

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we need not address the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due

⁶Dr. Fino is Board-certified in Internal Medicine and Pulmonary Diseases. Employer's Exhibit 11. The qualifications of Drs. Kanwal, Modi, Hess and Fintel are not found in the record.

⁷Inasmuch as the administrative law judge provided a proper basis for crediting the opinions of Drs. Sargent and Fino, the Board need not address the reasons which the administrative law judge provided for discrediting the opinions of Drs. Kanwal, Modi, Hess and Fintel. See *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge