

BRB No. 08-0408 BLA

M.V.)
(Widow of J.V.))
)
Claimant-Petitioner)
)
v.)
)
MEALLY COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 12/16/2008
)
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 Denying Benefits of Thomas F. Phalen,
Administrative Law Judge, United States Department of Labor.

M.V., Paintsville, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits (06-BLA-5574) of Administrative Law Judge Thomas F. Phalen, Jr., on a subsequent survivor's claim² 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 administrative law judge determined that claimant established her eligibility for benefits as the miner's surviving spouse under 20 C.F.R. §725.212, and therefore established an element of entitlement unrelated to the miner's physical condition pursuant to 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge found that claimant established that the miner had fifteen years of qualifying coal mine employment,³ but did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that she is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's findings on the merits of entitlement. Employer additionally asserts that, while harmless in light of the administrative law judge's ultimate denial of benefits, the administrative law judge erred in finding that *res judicata* did not apply to this case, and that "[t]his case never should have been tried on the merits." Employer's Brief at 8-10. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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, 1-177 (1989).

¹ Claimant, M.V., is the widow of the miner, J.V., who died on September 18, 1988. Director's Exhibit 18.

² The miner filed a claim for lifetime benefits on December 8, 1986. Director's Exhibit 1. On April 30, 1987, the district director denied the miner's claim for failure to establish any element of entitlement. *Id.* The record does not reflect that the miner took any further action on his claim. Claimant filed her initial claim for survivor's benefits on November 3, 1988. *Id.* Because claimant failed to provide evidence essential to processing her claim, the district director issued a show cause order on January 31, 1989, allowing claimant thirty days to respond. *Id.* Claimant did not respond, and her claim was therefore deemed abandoned and administratively closed. *Id.* Claimant filed the instant claim for benefits on April 18, 2005. Director's Exhibit 3.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's last coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4, 10.

We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

A subsequent survivor's claim, filed more than one year after the effective date of a final order denying survivor's benefits, must be denied unless a change in an "applicable condition of entitlement" unrelated to the miner's physical condition is established. 20 C.F.R. §725.309(d)(3); *see generally Boden v. G.M. & W. Coal Co., Inc.*, 23 BLR 1-39 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. In this case, the administrative law judge accurately observed that claimant's initial claim for survivor's benefits had been deemed abandoned, and that for "purposes of §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." *See* 20 C.F.R. §725.409(c); Decision and Order at 4. The administrative law judge rationally determined, therefore, that claimant's prior claim failed to establish any element of entitlement. *Id.* Finding that claimant established her eligibility for benefits as the miner's surviving spouse, and, therefore, also established a change in condition unrelated to the miner's physical condition under Section 725.309, the administrative law judge determined that claimant was entitled to a review of her claim on the merits of entitlement. *See* 20 C.F.R. §§725.309(d)(3), 725.212; *Watts*, 17 BLR at 1-70; Decision and Order at 4.

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. §718.205(a)(1)-(3); *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 the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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); *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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately observed that “[a]ll of the x-rays of record are negative for pneumoconiosis.”⁴ Decision and Order at 10. The administrative law judge rationally determined, therefore, that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. Consequently, we affirm this finding.

In addition, the administrative law judge correctly found that the claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3), as the record contains no biopsy evidence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are not available to claimant.⁵ See 20 C.F.R. §718.202(a)(2)-(3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 11. These findings, therefore, are affirmed.

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered that Drs. Musgrave, Hieronymus, and Bangudi opined that the miner suffered from pneumoconiosis, while Drs. O’Neil, Dahhan, and Fino opined that the miner did not suffer from pneumoconiosis. Director’s Exhibits 1, 18, 19, 20, 21; Employer’s Exhibits 5, 6, 7. Considering this evidence, the administrative law judge determined that none of the evidence favorable to claimant was entitled to full probative weight, and, therefore, claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4). Decision and Order at 15. In so finding, the administrative law judge rationally discounted the opinions of Drs. Musgrave and Hieronymus, because Dr. Musgrave based his opinion solely on a chest x-ray reading, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); Director’s Exhibit 19; and Dr. Hieronymus, the miner’s treating physician, failed to provide any basis or rationale for his diagnosis. See 20 C.F.R. §718.104(d)(5); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR

⁴ The administrative law judge accurately observed that both Drs. Bangudi and Musgrave referenced positive x-rays in their reports; however, these x-rays were not contained in the record. Decision and Order at 10.

⁵ The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. See 20 C.F.R. §718.305(e). Lastly, because this survivor’s claim was not filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

2-99, 2-103 n.6 (6th Cir. 1995); Decision and Order at 12; Director's Exhibit 21. Further, the administrative law judge permissibly determined that Dr. Bangudi's opinion was not entitled to full probative weight because it was based on an exaggerated coal mine employment history, as well as an x-ray and pulmonary function study not contained in the record. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 12; Director's Exhibit 20.

Regarding the contrary medical opinions of Drs. O'Neill, Dahhan, and Fino, that the miner did not have pneumoconiosis, the administrative law judge initially accorded diminished probative value to Dr. O'Neill's opinion because it was based on a pulmonary function and arterial blood study not contained in the record. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 12; Director's Exhibit 1. By contrast, the administrative law judge permissibly accorded full probative value to the opinions of Drs. Dahhan and Fino, because he found their opinions to be well reasoned, well documented, and better supported by the objective evidence of record. *See Tennessee Consol. Coal Co. v. Crisp*, 886 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 12, 14-15; Employer's Exhibits 5, 7.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

In light of our determination to affirm the denial of benefits, we decline to address employer's assertion that the administrative law judge erred in reaching the merits of entitlement in this case.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge