BRB No. 06-0475 BLA

LINDA LOU COUCH (Widow of GORDON COUCH) Claimant-Petitioner v. SHAMROCK COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/16/2007 DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (2004-BLA-6420) of Administrative Law Judge Daniel J. Roketenetz 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 administrative law judge found that the evidence failed 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).[1] Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), based on x-ray evidence, and Section 718.202(a)(4), based on medical opinion evidence. Claimant also argues that the administrative law judge erred in not finding that pneumoconiosis was an underlying cause of the miner's death pursuant to Section 718.205(c). Additionally, claimant contends that controlling weight should have been accorded to the opinion of the miner's treating physician, Dr. Spady. Employer, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, arguing that since claimant did not submit any medical reports other than treatment records, the administrative law judge should have admitted Dr. Spady's deposition testimony in lieu of a medical report pursuant to 20 C.F.R. §725.414(c). The Director further states, however, that any error in excluding Dr. Spady's deposition testimony is harmless and remand of the case is unnecessary, if the Board affirms the administrative law judge's finding that, even if admitted, he would have found Dr. Spady's opinion undocumented because the doctor failed to cite any specific objective medical testing supporting his testimony. The Director does not otherwise address claimant's arguments.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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, 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-

[1] Because claimant failed to establish that the miner had pneumoconiosis, the administrative law judge also found claimant could not establish that pneumoconiosis arose out of coal mine employment. Decision and Order at 11; *see* 20 C.F.R. §718.203.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For 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 20 C.F.R. §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).

Claimant first contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis by relying almost solely on the interpretations of the readers with superior qualifications, and by relying on the "numerical superiority" of certain x-ray interpretations. Claimant also contends that the administrative law judge "may have selectively analyzed" the x-ray evidence, which he may not do.

In considering the x-ray evidence of record, the administrative law judge first found that the only x-rays contained in the record were hospital records from the Veteran's Administration dating from 1997 to 2001 and that none of these x-rays was taken for the purpose of diagnosing the existence or extent of pneumoconiosis. In addition, the administrative law judge found that there was no evidence in the record of the credentials of the x-ray readers or that the x-rays were classified in accordance with 20 C.F.R. §§718.202(a), 718.102.[3] The administrative law judge concluded, therefore, that none of the x-rays of record was supportive of a finding of the existence of

[3] Section 718.202(a)(1) provides in pertinent part:

> A chest X-ray conducted and classified in accordance with §718.102 may form the basis for a finding of the existence of pneumomconiosis.

20 C.F.R. §718.202(a)(1).

Section 718.102 provides in pertinent part:

> A chest X-ray to establish the existence of pneumomconiosis shall be classified as Category 1, 2, 3, A, B, or C,…..

20 C.F.R. §718.102(b).

pneumoconiosis pursuant to Section 718.202(a). We agree. 20 C.F.R. §§718.202(a), 718.102.

In addition, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence in support of this contention nor is there any finding by the administrative law judge which supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Claimant also argues that the reasoned medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, claimant asserts that the administrative law judge erred in his consideration of the opinion of the miner's treating physician, Dr. Spady, who concluded that the miner suffered from coal workers' pneumoconiosis, Director's Exhibit 16: Claimant's Exhibits 1, 2: in failing to accord it dispositive weight and in failing to consider the doctor's deposition testimony in a manner consistent with the regulatory requirements at 20 C.F.R §718.104(d).[4] Claimant additionally asserts that treatment records from the Lexington Clinic, Claimant's Exhibit 4, and the Veteran's Administration Hospital, Claimant's Exhibit 5, establish that the miner suffered from coal worker's pneumoconiosis. Claimant also contends that the award from the Social Security Administration, finding the miner totally disabled and unable to work around pulmonary irritants, would support a finding of pneumoconiosis.

In considering the medical opinion evidence, the administrative law judge excluded the April 21, 2003 and November 11, 2003, deposition testimony of Dr. Spady, Claimant's Exhibits 1, 2, because claimant failed to submit a "medical report" from Dr.

[4] Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

1) Nature of relationship.
2) Duration of relationship.
3) Frequency of treatment.
4) Extent of treatment.

20 C.F.R. §718.104(d)(1)-(4). The regulation also requires, however, that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Spady. The administrative law judge concluded that because claimant did not submit a medical report from Dr. Spady, the doctor's deposition testimony could not be considered pursuant to Section 725.414(c). The administrative law judge further concluded that even if he had admitted Dr. Spady's deposition testimony he would not have credited it because Dr. Spady failed to cite any specific objective medical testing that supported his testimony, *i.e.*, the testimony was undocumented. Decision and Order at 9 n. 4.

Apparently, the administrative law judge focused on the first sentence of 20 C.F.R. §725.414(c) and overlooked the following two sentences. Section 725.414(c) provides in relevant part:

> A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If any party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this section.

20 C.F.R. §725.414(c).

Review of the record demonstrates that claimant has not submitted any medical reports beyond treatment records.[5] Accordingly, we hold that it was error for the administrative law judge to exclude Dr. Spady's deposition testimony. 20 C.F.R. §725.414(c). Nevertheless, we hold that such error is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985), as the administrative law judge went on to find that Dr. Spady's testimony was undocumented and, as such, could not establish the existence of pneumoconiosis. 20 C.F.R. §718.104(d); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Collins v. J & L Steel*, 21 BLR 1-181 (1999). We, thus, reject claimant's assertion that Dr. Spady's opinion is entitled to dispositive weight based on the physician's status as the miner's treating physician. *See* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d 501, 22 BLR 2-624.

[5] Treatment records are to be admitted into the record without regard to the evidentiary limitations. 20 C.F.R. §725.414(a)(4); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*).

Further, contrary to claimant's assertion, the administrative law judge permissibly found the treatment records from the Veteran's Administration Hospital and Lexington Clinic could not support claimant's burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as the reports of physicians contained therein did not provide any explanation of the bases for their conclusions or any objective medical testing to support their diagnoses. *See Williams*, 338 F.3d 501, 22 BLR 2-624; *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Collins*, 21 BLR 1-181. Additionally, the administrative law judge found that the Social Security determination of total disability due, in part, to pneumoconiosis did not contain any medical reports and was not binding in this case. *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). Thus, the administrative law judge has permissibly concluded that claimant has failed to carry her burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a survivor's claim, *see Trumbo*, 17 BLR 1-85, an award of benefits is precluded in this case, and we need not consider claimant's argument regarding death due to pneumoconiosis at 20 C.F.R. §718.205.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge