

BRB No. 97-0792 BLA

SUSAN KENEDA)	
(Widow of ARSON KENEDA))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
ISLAND CREEK COAL COMPANY)	
)	
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 on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Susan Keneda, Simon, West Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow, without the assistance of legal counsel, appeals the Decision and Order on Remand (93-BLA-55) of Administrative Law Judge Stuart A. Levin denying benefits on a miner's claim and 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).¹ This case is on appeal to the Board for the second time. In his original Decision and Order, the administrative law judge credited the miner with more than twenty-five years of coal mine employment and adjudicated the claims pursuant to 20

¹ Claimant is the surviving spouse of the miner who filed a claim for benefits on March 19, 1990 and died on December 13, 1991. Director's Exhibit 1. Claimant filed her claim for benefits on January 8, 1992. See Director's Exhibit 57.

C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis and, therefore, failed to establish death due to pneumoconiosis. Accordingly, benefits were denied in both claims. Claimant appealed and in *Keneda v. Island Creek Coal Co.*, BRB No. 93-2374 BLA (Mar. 30, 1995) (unpub.), the Board vacated the denial of benefits and remanded the case for further consideration. On remand, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis and erred in finding that the miner's death was not due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence and are in accordance with 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).

In order to establish entitlement to benefits in a 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 disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Additionally, to establish entitlement to benefits pursuant to Part 718 on a survivor's claim filed after January 1, 1982, claimant not only must establish that the miner suffered from pneumoconiosis and that the pneumoconiosis arose out of coal mine employment but claimant must also establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

After consideration of the administrative law judge's Decision and Order on Remand, 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 that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge considered the x-ray evidence of record pursuant to Section 718.202(a)(1) and rationally accorded greater weight to the x-ray interpretations of the readers with superior qualifications and to the clear preponderance of negative x-ray readings. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65

(1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 5. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

In determining whether the existence of pneumoconiosis was established by autopsy evidence pursuant to Section 718.202(a)(2), the administrative law judge permissibly credited the report of Dr. Kleinerman, which did not include a diagnosis of pneumoconiosis, over the report of Dr. DeLara, since Dr. Kleinerman possessed superior qualifications. Decision and Order on Remand at 5-7. Consequently, we affirm the administrative law judge's finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2).

Additionally, the administrative law judge properly determined that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(3) as the presumptions are not applicable since the miner filed his claim after January 1, 1982, there is no evidence of complicated pneumoconiosis in the record and the miner did not die before March 1, 1978. See 20 C.F.R. §§718.202(a)(3), 718.304; 718.305, 718.306; Decision and Order on Remand at 7; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Moreover, the administrative law judge considered the entirety of the medical opinion evidence of record and acted within his discretion in concluding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). In so finding, the administrative law judge rationally relied on the opinions of Drs. Renn, Dahhan and Hippensteel that the miner did not suffer from pneumoconiosis, since the administrative law judge determined that their opinions were supported by the objective evidence. *Clark, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Piccin, supra*; Decision and Order on Remand at 7-8. 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). Furthermore, since the determination of whether the miner had pneumoconiosis is primarily a medical determination, claimant's testimony, under the circumstances of this case, could not alter the administrative law judge's finding. 20 C.F.R. §718.202(a)(4); *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in both a miner's claim and a survivor's claim pursuant to Part 718, entitlement thereunder is precluded. *Trumbo, supra*; *Kneel v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Trent, supra*; *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987);

Perry, supra.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge