

BRB No. 07-0399 BLA

N. M.)
(Widow of C. M.))
)
Claimant-Petitioner)
)
v.)
)
APOGEE COAL COMPANY)
)
and)
)
ARCH COAL COMPANY,) DATE ISSUED: 01/30/2008
INCORPORATED, c/o UNDERWRITERS)
SAFETY & CLAIMS)
)
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 Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

N.M., Benham, Kentucky, *pro se*.

Ralph D. Carter (Barret, Haynes, May & Carter P.S.C.), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals,¹ without the assistance of counsel,² the Decision and Order Denying Survivor's Benefits (05-BLA-5848) of Administrative Law Judge Adele Higgins Odegard rendered 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 credited the miner with thirty-eight years of coal mine employment.³ Decision and Order at 6. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant did not 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 generally challenges the denial of benefits. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's 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 Co.*, 12 BLR 1-176, 1-177 (1989). 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

¹ Claimant is the miner's widow. The miner died on February 22, 2004. Director's Exhibit 14. Claimant filed this claim for survivor's benefits on March 31, 2004. Director's Exhibit 5. The district director denied benefits in a proposed decision and order issued January 18, 2005. Director's Exhibit 32. Claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 33.

² Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985) (Order).

³ The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 11. 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*).

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. 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors’ claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2), (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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the narrative reports of five x-rays. The report dated December 9, 2003, noted infiltrates in the right lung base and a “relatively clear” left lung. Director’s Exhibit 17 at 37. The report of January 10, 2004, noted that the “lung fields are clear.” *Id.* at 32. The report dated February 4, 2004, noted that the lungs were emphysematous and that “no definite acute pulmonary lesions are seen.” *Id.* at 31. The report dated February 14, 2004, noted that the lung fields “do not show any focal lesions of acute nature.” *Id.* at 27. The report dated February 19, 2004, noted that the infiltrates in the left lung had resolved, but that infiltrates had developed in the mid and right lower lung field. *Id.* at 26. Based on these reports, the administrative law judge concluded that, “While many radiographic studies were admitted into evidence, and while the records mention the observation of an opacity and emphysema, these studies are diagnostic in nature, and do not mention a specific finding of pneumoconiosis. Therefore, I find that the Claimant is unable to establish the existence of pneumoconiosis under this provision.” Decision and Order at 7. Based on the finding that none of the x-ray reports mentions a finding of pneumoconiosis, the administrative law judge permissibly found that the x-ray evidence did not establish the existence of pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). We therefore affirm the administrative law judge’s finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered a surgical pathology report by Dr. Sides, dated February 26, 2004. Dr. Sides conducted a gross and microscopic examination of the miner’s right lung, which was removed post-mortem, and diagnosed acute pneumonitis and centrilobular emphysema. Director’s Exhibit 15. Dr. Sides found some “anthracotic lymph nodes,” and areas of “pleural

thickening.” *Id.* Under the gross description, Dr. Sides stated that, “No distinct areas of fibrotic appearing tissue are grossly identified and no macules (nodules) of fibrosis combined with carbonaceous deposits are evident in the lung.” *Id.* Under the microscopic description, Dr. Sides stated, “Again, there are areas of slight perivascular and pleural thickening associated with black, particulate carbonaceous pigment deposition, but a true macule is not identified.” *Id.* A finding on autopsy or biopsy of anthracotic pigmentation is not sufficient, by itself, to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2); *see Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-111 (2001) (*en banc*) (Dolder & Smith, JJ., concurring and dissenting). Thus, the administrative law judge permissibly found that the pathology findings of carbonaceous pigment and anthracotic lymph nodes, were insufficient to establish the existence of pneumoconiosis. *See Hapney*, 22 BLR at 1-111. Moreover, the administrative law judge went on to consider Dr. Sides’s diagnosis of emphysema, finding it insufficient to establish legal pneumoconiosis,⁴ as Dr. Sides failed to discuss whether the emphysema arose out of coal mine employment. *see* 20 C.F.R. §718.201; *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317, 1-322 (1985). We therefore affirm the administrative law judge’s finding that the pathology evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge accurately determined that none of the presumptions listed were applicable, as this is a survivor’s claim filed after June 30, 1982, in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge’s findings pursuant to 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered two letters by the miner’s treating physician, Dr. Ford; a report, a response letter, and a deposition by Dr. Jarboe; and the miner’s medical treatment records. In his letters, Dr. Ford stated that “coal workers’ pneumoconiosis,” chronic obstructive pulmonary disease, and “black lung,” contributed to the miner’s death. Claimant’s Exhibits 1, 2. In his first consultative report, Dr. Jarboe found that coal workers’ pneumoconiosis did not cause or contribute to the miner’s death. Dr. Jarboe specifically noted that “there was no evidence in the autopsy material (right lung) that [the miner] had significant coal workers’ pneumoconiosis. He did have some deposition of carbonaceous pigment, but no coal macules or fibrosis was described, indicating the presence of coal workers’ pneumoconiosis.” Employer’s Exhibit 1 at 3. Dr. Jarboe also stated that “several x-rays were taken during the course of [the miner’s] medical care, and none showed a pattern

⁴ “Legal” pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

compatible with coal workers' pneumoconiosis....” *Id.* Dr. Jarboe further stated that the records indicated that the miner had emphysema and chronic obstructive pulmonary disease, noting that there was no data available to assess the severity of any impairment caused by chronic obstructive pulmonary disease and it was “difficult to pin down” the exact cause of the emphysema. *Id.* In his second report, Dr. Jarboe concluded that there was no evidence that the miner had coal workers' pneumoconiosis, that the evidence did not establish that the miner's emphysema caused a severe impairment, and that there was no evidence that the inhalation of coal dust or the existence of pneumoconiosis caused the miner's chronic obstructive pulmonary disease. Employer's Exhibit 2 at 3. Dr. Jarboe's deposition restated his two reports. Employer's Exhibit 3. The treatment records listed numerous medical conditions, including chronic obstructive pulmonary disease, prostate cancer, heart problems, anemia, and pneumonia. Director's Exhibit 17.

The administrative law judge permissibly accorded Dr. Ford's opinion little weight, as the physician failed to provide any objective medical tests to support his conclusions or any explanation for his opinion that the miner had coal workers' pneumoconiosis, and he did not link the miner's chronic obstructive pulmonary disease to the miner's coal mine employment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In so finding, the administrative law judge considered Dr. Ford's status as the miner's treating physician and properly assessed the credibility of his opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge permissibly accorded greater weight to Dr. Jarboe's opinion based on his superior qualifications, and because the physician discussed the etiology of the miner's chronic obstructive pulmonary disease and emphysema and provided a rationale for why the emphysema was not caused by coal dust. *See Rowe*, 710 F.2d at 255, 5 BLR 2-103. We therefore affirm the administrative law judge's finding that the medical opinions did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as it is supported by substantial evidence.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, a finding of entitlement thereunder is precluded. *See Trumbo*, 17 BLR at 1-85; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). We therefore affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge