

BRB No. 03-0821 BLA

MARILYN J. KEMBEL)
(Widow of RALPH J. KEMBEL))
)
 Claimant-Petitioner)
)
 v.)
)
 HEGINS MINING COMPANY) DATE ISSUED: 07/14/2004
)
 and)
)
 CONSTITUTION STATE SERVICES)
 COMPANY)
)
 Employer/Carrier-)
 Respondent)
)
 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 Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman and Goggin),
Bethlehem, Pennsylvania, for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire,
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: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

Claimant appeals the Decision and Order Denying Benefits (02-BLA-5354) of Administrative Law Judge Janice K. Bullard 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).¹ Claimant filed her survivor's claim on April 26, 2001. Director's Exhibit 3. The administrative law judge initially determined that the medical evidence was insufficient to establish that the deceased miner had suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Further, the administrative law judge found that, even assuming that the miner had suffered from the disease, the evidence failed to establish that his death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by not relying on the opinion of Dr. McLaughlin that the miner had pneumoconiosis and that it was a substantial contributing factor to death. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Worker's Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see 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). For survivor's claims filed on or after January 1, 1982, death will be considered to be 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see*

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Lango v. Director, OWCP, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

Claimant argues that the administrative law judge erred in finding that she failed to establish the existence of pneumoconiosis on the basis of x-ray evidence at 20 C.F.R. §718.202(a)(1). Contrary to claimant's contention, the administrative law judge properly accorded little weight to the two positive readings of the July 12, 1973 x-ray, since the credentials of the physicians who interpreted that film were unknown. Instead, the administrative law judge properly focused her consideration on the x-ray readings of films dated March 23, 1998 and March 28, 1998 by dually qualified, Board-certified radiologists and B-readers. This was proper. 20 C.F.R. §718.202(a)(1); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Specifically, the administrative law judge found that the March 28, 1998 x-ray was read as negative by Dr. Wheeler, a Board-certified radiologist and B-reader, and as positive by Dr. Ahmed, also a Board-certified radiologist and B-reader. In addition, the administrative law judge found that Dr. Wheeler was also an associate professor of radiology, that he had served on a variety of committees in his specialty, and that he had made numerous demonstrations and presentations on the subject of radiology. Regarding the March 28, 1998 x-ray, the administrative law judge found that it was read as positive by Drs. Cappiello and Miller, Board-certified radiologists, B-readers, and professors of radiology, and as negative by Drs. Wheeler and Scott, also Board-certified radiologists and B-readers, and professors of radiology. The administrative law judge acknowledged that while Drs. Cappiello and Miller were professors of radiology, Dr. Cappiello had been a professor of radiology twenty years ago and Dr. Miller's writings were not as topical as those of Drs. Wheeler and Scott. The administrative law judge determined, therefore, that the x-ray evidence failed to establish the existence of pneumoconiosis, and that even if she were to accord equal weight to the readings of these two x-rays, the x-ray evidence still would not establish the existence of pneumoconiosis because the evidence would be in equipoise.

Claimant also contends that the limitation placed on the number of x-rays she could submit violates her due process rights by denying her the opportunity to prove her case when the administrative law judge finds that the x-ray evidence cannot establish the existence of pneumoconiosis because it is in equipoise. Since the administrative law judge also credited the readings of the physicians based on their additional credentials as professors of radiology and authors of widely published articles in that field, however, the administrative law judge did not rely on the fact that the x-ray evidence was in equipoise to find that the existence of pneumoconiosis was not established. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Kozele v. Rochester & Pittsburgh Coal*

Co., 6 BLR 1-378, 1-382 n.4 (1983). Accordingly, we need not further address claimant's due process argument.

Claimant additionally argues that the administrative law judge erred in finding the existence of pneumoconiosis was not established based on medical opinion evidence. In considering the medical opinion evidence at Section 718.202(a)(4), the administrative law judge recognized that Dr. McLaughlin was a treating physician, but she accorded his opinion little weight because she found it was not fully reasoned or documented. This was proper. *See* 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002)(administrative law judge must assess quality of physician's reasoning); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Specifically, the administrative law judge found: Dr. McLaughlin's observation that the pattern seen on the miner's CT scan which he "felt to be most likely secondary to chronic inhalation disease was equivocal; pulmonary function studies and blood gas studies referenced in the record produced normal results which were inconsistent with Dr. McLaughlin's opinion, and Dr. McLaughlin's observation that most of the miner's x-rays were interpreted as showing "pneumoconiosis with emphysema and fibrosis" was not supported by the x-ray evidence of record. Decision and Order at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Claimant also contends that the administrative law judge erred in failing to consider the miner's hospital records which consistently noted the existence of coal workers' pneumoconiosis and the miner's death certificate which listed pneumoconiosis as one cause of death. The administrative law judge listed the findings made during claimant's various hospitalizations, Decision and Order at 7-9. The administrative law judge, however, credited the opinion of Dr. Hertz, who reviewed the evidence of record, including hospital records, and found that claimant did not have coal workers' pneumoconiosis. Further, the administrative law judge found that the listing of pneumoconiosis on the miner's death certificate was not sufficient, in and of itself, to establish the existence of pneumoconiosis. Decision and Order at 13. This was proper. 20 C.F.R. §718.202(a)(4); *Lango*, 104 F.3d 573, 21 BLR 2-12; *Clark*, 12 BLR 1-149; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

In conclusion, on weighing all the evidence of record, the administrative law judge properly found that it failed to establish the existence of pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Further, because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, *Trumbo*, 17 BLR 1-85, we need not consider claimant's argument regarding death causation.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge