

BRB No. 03-0848 BLA

NELLIE MARIE HINCHMAN	)		
	)		
Claimant-Petitioner	)		
	)		
v.	)	DATE	ISSUED:
07/23/2004	)		
	)		
SOUTHERN OHIO 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Nellie Marie Hinchman, Gallipolis, Ohio, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant,<sup>1</sup> representing herself, appeals the Decision and Order – Denial of Benefits (03-BLA-5227) of Administrative Law Judge Robert L. Hillyard on a

---

<sup>1</sup>Claimant is the widow of the miner, Kenneth Eugene Gray, who died on March 21, 2001. Director’s Exhibit 5. After the miner’s death, claimant married Richard Hinchman on November 29, 2002. Hearing Tr. at 11. Claimant was not represented by counsel at her hearing. At the hearing, which was held on May 7,

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).<sup>2</sup> This case involves a survivor's claim filed on April 10, 2001. After crediting the miner with at least ten years of coal mine employment, the administrative law judge considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found, assuming *arguendo* that the existence of pneumoconiosis had been established, that claimant failed to 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 contends that the administrative law judge erred in denying benefits. Employer has filed a response brief in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by

---

2003, the administrative law judge informed claimant of her right to obtain counsel. *Id.* at 5. Claimant told the administrative law judge that she tried to obtain counsel, but was unsuccessful. *Id.* Claimant indicated unequivocally that she wanted to proceed with the hearing as scheduled. *Id.* The administrative law judge admitted Director's Exhibits 1-23 and Employer's Exhibits 1-8 into the record, to which claimant stated she had no objection. *Id.* at 6-9. The administrative law judge then informed claimant about the elements of entitlement she needed to prove in support of her claim, provided her with an opportunity to make an opening statement, and gave claimant full occasion to testify at the hearing. *Id.* at 9-19. The administrative law judge further provided claimant with an opportunity to submit a written closing statement, which claimant did by letter dated July 7, 2003.

<sup>2</sup>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.

substantial evidence, are rational, and are 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).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge properly found that the record contains only one x-ray interpretation probative of the issue, a negative reading of a film dated January 2, 1972. Decision and Order at 10; Employer's Exhibit 2. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

In addressing whether claimant established the existence of pneumoconiosis under Section 718.202(a)(2), the administrative law judge properly found that there is no autopsy or biopsy evidence in the record. Decision and Order at 10. We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2).

In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established under Section 718.202(a)(3). The administrative law judge properly determined that the presumption at 20 C.F.R. §718.304 does not apply because the record does not contain evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 10. The administrative law judge further properly determined that the presumptions at 20 C.F.R. §§718.305 and 718.306 are inapplicable in this case since this survivor's claim was filed after January 1, 1982, and since the miner died after March 1, 1978. *See* 20 C.F.R. §§718.305, 718.306; Decision and Order at 10.

In discussing whether the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Subbiah, Branscomb and

Rosenberg.<sup>3</sup> Director's Exhibits 5-8; Employer's Exhibits 1, 4, 6, 8, 9. Dr. Subbiah, who testified that he was the miner's treating physician for approximately twenty years, Employer's Exhibit 4 at 9-10, indicated in a brief letter dated August 25, 1989, that the miner had chronic obstructive lung disease secondary to both cigarette smoking and coal dust exposure. Director's Exhibit 6. In subsequent office visit notes from 1999 to 2000, and in a hospitalization discharge summary dated March 11, 2001, Dr. Subbiah listed chronic obstructive lung disease among the miner's medical problems. Director's Exhibit 7. In a letter dated June 26, 2001, Dr. Subbiah stated that the miner had chronic obstructive lung disease and pneumoconiosis. Director's Exhibit 8. In his deposition, Dr. Subbiah testified that he based his diagnosis of pneumoconiosis on a chest x-ray he administered, which showed diffuse pulmonary infiltrates bilaterally which "may be related to coal dust exposure."<sup>4</sup> Employer's Exhibit 4 at 11. With regard to the cause of the miner's death, Dr. Subbiah indicated in his June 26, 2001 letter that the miner died from pancreatic cancer, although pneumoconiosis "might have [been] a contributing factor in his death." Director's Exhibit 8. In his deposition, Dr. Subbiah testified that the cause of the miner's death was pancreatic cancer, and that it would be "speculative" to attribute the miner's death to his other conditions. Employer's Exhibit 4 at 30-31. Drs. Branscomb and Rosenberg reviewed all of the medical evidence of record, and concluded that the miner did not have pneumoconiosis or any lung disease attributable, even in part, to coal dust exposure. Employer's Exhibits 1, 6, 8, 9. Drs. Branscomb and Rosenberg further indicated that while the miner had chronic obstructive pulmonary disease secondary to a ninety pack year smoking history, this condition did not factor into the miner's death at all, the cause of which was cancer of the pancreas. *Id.*

In considering Dr. Subbiah's opinion, the administrative law judge properly found that a treating physician's opinion is not automatically entitled to greater weight, but that the opinion of a treating physician gets the deference it deserves based upon its power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order at 11. The administrative law

---

<sup>3</sup>The administrative law judge also referred to a physical examination by Dr. Munro and a chest x-ray report from Dr. Long, which did not indicate whether the miner suffered from pneumoconiosis or any condition attributable to coal dust exposure. Decision and Order at 13; Director's Exhibit 7. Thus, the notes in the record from these two physicians are not probative of the issue at 20 C.F.R. §718.202(a)(4).

<sup>4</sup>Dr. Subbiah did not identify the x-ray he was referring to in his deposition. Employer's Exhibit 4 at 11-13.

judge properly discounted Dr. Subbiah's opinion, notwithstanding that the doctor was the miner's treating physician, on the ground that Dr. Subbiah's opinion that the miner had pneumoconiosis was not well-reasoned or supported by the objective evidence of record. *Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 11-13; Director's Exhibits 6-8; Employer's Exhibit 4. Specifically, the administrative law judge noted that Dr. Subbiah, who first indicated in 1989 that the miner had chronic obstructive lung disease due, in part, to coal dust exposure, did not subsequently discuss or mention the presence of this disease, or the existence of pneumoconiosis, in any of his numerous treatment notes covering a period from 1989 through 1999. Decision and Order at 12; Director's Exhibit 7. The administrative law judge also found that the numerous objective data obtained during Dr. Subbiah's treatment of the miner were normal, according to Dr. Subbiah himself, including physical examination findings, pulmonary function studies, chest x-rays and EKG's. *Id.* With regard to the contrary opinions of Drs. Branscomb and Rosenberg, the administrative law judge properly credited them upon finding them well-reasoned and documented in light of the objective evidence of record, and because both physicians had an opportunity to review all of the evidence of record. *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-14; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 14; Employer's Exhibits 1, 6, 8, 9. We affirm, therefore, the administrative law judge's finding that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(4).

Because the administrative law judge properly found that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(1)-(4), the administrative law judge properly determined that entitlement to benefits was precluded. *See Trumbo*, 17 BLR at 1-88.

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

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge