

BRB No. 06-0741 BLA

RAMONA PETTIGREW )  
(Widow of FREDDIE PETTIGREW) )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 PEABODY WESTERN COAL COMPANY )  
 ) DATE ISSUED: 07/27/2007  
 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 Denying Survivor's Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Michael Wanger , Durango, Colorado, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Survivor's Benefits (2004-BLA-5506) of Administrative Law Judge Stephen L. Purcell on a 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>1</sup> The administrative law judge credited the

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<sup>1</sup> Claimant is the widow of the miner, who died on April 21, 1999. Director's Exhibit 9.

miner with twenty-six years of coal mine employment and adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718, based on the December 13, 2001 filing date.<sup>2</sup> Based upon his interpretation of the regulatory definition of pneumoconiosis, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis that appears in 20 C.F.R. §718.304 and that employer rebutted the presumption set forth in 20 C.F.R. §718.203(b). Based upon these determinations, the administrative law judge concluded that claimant could not establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant alleges that employer did not overcome the rebuttable presumption under 20 C.F.R. §718.203(b), that the evidence supports a finding that claimant is entitled to benefits pursuant to 20 C.F.R. §718.205, and that the administrative law judge should have found entitlement to benefits established based upon the opinion of Dr. Preger, that the miner's pneumoconiosis contributed to his death. In response, employer urges affirmance of the administrative law judge's denial of benefits.<sup>3</sup> The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief on the merits of 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 applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 establish that the miner had pneumoconiosis, that the miner's 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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993);

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<sup>2</sup> Because the miner's coal mine employment occurred in Arizona, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> Employer maintains that claimant has not invoked Board review, as she has failed to identify specific allegations of error. Although we agree that the causation issue has not been well-briefed, claimant has raised arguments sufficient to permit the Board to review the findings made by the administrative law judge regarding the etiology of the miner's silicosis. *See* 20 C.F.R. §802.211(b).

*Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if 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 hastened the miner's death. 20 C.F.R. §718.205(c)(5).

The evidence considered by the administrative law judge in this case includes readings of x-rays dated October 25, 1990, May 6, 1992, November 19, 1992, and October 1, 1998. Director's Exhibit 12-15. All of the films were classified as positive for pneumoconiosis under the ILO system. *Id.* The films dated May 6, 1992 and November 19, 1992 were also classified as containing Type A large opacities. Director's Exhibits 12, 13, 15. In addition, the administrative law judge addressed the medical opinions of Drs. Repsher, Preger and Renn, and the death certificate, prepared by Dr. Lutken. Dr. Repsher reviewed the miner's medical records, diagnosed complicated silicosis by CT scan, and stated that it was caused by exposure to dust during the miner's employment in a uranium mine. Director's Exhibit 14; Hearing Transcript at 82-106. Dr. Preger reviewed the miner's medical records and detected type A opacities on the miner's x-rays, but did not diagnose their etiology. Director's Exhibit 15. During his testimony at the hearing, Dr. Preger stated that he could not determine whether silica exposure in uranium mining or coal dust exposure caused the miner's pulmonary condition. Hearing Transcript at 50-51, 56-57. Dr. Renn reviewed the miner's medical records and concluded that the pneumoconiosis revealed on the miner's x-rays is not related to coal dust exposure, but was caused by the miner's exposure to silica while employed as a uranium miner. Employer's Exhibits 1, 9. On the death certificate, Dr. Lutken identified the immediate cause of death as pneumonia. Director's Exhibit 9. Dr. Lutken listed small cell cancer due to uranium mining as an underlying cause of death. *Id.*

Prior to weighing the evidence relevant to Section 718.202(a), the administrative law judge discussed the regulatory definition of pneumoconiosis and noted that the disease is defined as a condition caused by dust exposure in coal mine employment.<sup>4</sup>

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<sup>4</sup> Under 20 C.F.R. §718.201(a), "pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment." Pursuant to 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "including any chronic lung disease or impairment and its

Decision and Order at 19-20 and n.5. Pursuant to Section 718.202(a)(1), the administrative law judge determined that the preponderance of the x-ray evidence was positive for both simple and complicated pneumoconiosis. Decision and Order at 21. The administrative law judge then addressed the medical opinion evidence under Section 718.202(a)(4) and determined that it demonstrated that the miner suffered from complicated silicosis caused by his uranium mining and did not arise out of his coal mine employment. Decision and Order at 23. The administrative law judge further concluded, based upon his understanding of the definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), that claimant did not establish the existence of clinical or legal pneumoconiosis under Section 718.202(a), nor was claimant entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. *Id.* The administrative law judge also indicated that “in the event that my interpretation of [Section 718.202(a)] is incorrect, it should be clear from my analysis...that the medical opinion evidence conclusively rebuts any presumption under Section 718.203(b) that [claimant’s] silicosis arose out of coal mine employment.” *Id.* at 20 n.5. Based upon these findings, the administrative law judge stated that claimant could not establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). *Id.* at 23.

Claimant argues that the administrative law judge erred in finding that employer established rebuttal of the Section 718.203(b) presumption that the miner’s silicosis arose out of coal mine employment. This contention is without merit. As an initial matter, we note that as indicated above, the administrative law judge rendered his findings regarding the cause of the miner’s pneumoconiosis under Section 718.202(a), rather than Section 718.203. *See* Decision and Order at 20-23. The Board has held, however, that when x-rays are classified as positive for pneumoconiosis under the ILO system, comments regarding whether the pneumoconiosis is related to dust exposure in coal mine employment are to be addressed under Section 718.203. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999). The administrative law judge’s consideration of the evidence under Section 718.202(a) does not constitute error requiring remand, as the administrative law judge explicitly stated that if he addressed the relevant evidence under Section 718.203(b), he would find the presumption rebutted, Decision and Order at 20 n. 5, and the administrative law judge’s findings with respect to the causation issue are rational and supported by substantial evidence. *Id.* at 23.

The administrative law judge acted within his discretion as fact-finder in determining that the opinions in which Drs. Repsher and Renn stated that coal dust

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sequelae arising out of coal mine employment...[and] any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

exposure was not a contributing cause of the miner's silicosis were reasoned and documented, as the physicians identified the evidence upon which they relied and provided detailed rationales for their conclusions. Decision and Order at 22-23; Hearing Transcript at 97; Director's Exhibit 14; Employer's Exhibits 1, 9; *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989)(*en banc*). The administrative law judge also rationally found that the opinions of Drs. Repsher and Renn were uncontradicted, as Dr. Preger stated that he could not discern the etiology of the miner's silicosis from the evidence available to him and Dr. Lutken did not identify any coal dust related lung disease on the death certificate. *Clark*, 12 BLR at 1-151; Director's Exhibits 9, 15.

We affirm, therefore, the administrative law judge's findings that the preponderance of the evidence establishes that the miner's lung disease did not arise out of coal mine employment, that employer rebutted the presumption set forth in Section 718.203(b), that the miner's silicosis arose out of coal mine employment, and that claimant is not entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. Because claimant did not establish that the miner's lung disease arose out of coal mine employment, an essential element of entitlement, we must also affirm the denial of benefits. *Trumbo*, 17 BLR at 1-87; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).



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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge