BRB No. 07-0851 BLA

L.G. (Widow of C.G.) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 07/09/2008 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

L.G., Lake City, Florida, *pro se*.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Denial of Benefits (2005-BLA-5248 and 2006-BLA-6130) of Administrative Law Judge Donald W. Mosser, rendered 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). The administrative law judge credited the miner with at least nine months of coal mine employment and adjudicated this miner's

[1] Claimant is the miner's widow, and was represented by counsel before the administrative law judge. Hearing Transcript at 5.

claim[2] and survivor's claim[3] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied on both the miner's and the survivor's claims.

On appeal, claimant generally challenges the administrative law judge's finding on length of coal mine employment as well as his weighing of the evidence and denial of benefits. The Director, Office of Workers' Compensation Programs, responds and urges affirmance of the denial of benefits for both claims.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the

[2] The miner filed his initial claim on April 7, 1995, which was denied by the district director. Director's Exhibit 1. The miner timely requested a hearing, but the district director did not refer the case to the Office of Administrative Law Judges. On November 17, 2003, the miner filed another claim, but died on March 3, 2004. Director's Exhibit 3. The district director denied benefits on July 30, 2004. Director's Exhibit 13. Claimant requested a hearing on behalf of the miner. Prior to the hearing, claimant moved for a finding that the miner's 1995 claim was still viable on the ground that the miner had been denied a hearing. Administrative Law Judge Donald W. Mosser granted the motion. Consequently, the Director, Office of Workers' Compensation Programs, withdrew the duplicate claim provision from consideration as a contested issue pursuant to 20 C.F.R. §725.309. Hearing Transcript at 7.

[3] The widow filed a survivor's claim on May 3, 2004. Director's Exhibit 18.

[4] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1.

miner is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901, 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-107-8 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Claimant initially challenges the administrative law judge's finding regarding length of coal mine employment, and argues that the miner's allegations of over three years of coal mine employment are not contradicted. We disagree. In calculating the years of coal mine employment, the administrative law judge permissibly relied on the Social Security Administration earnings statement that indicated nine months of coal mine employment in 1943, over the conflicting and inconsistent allegations of the miner, who listed coal mine employment from 1940-1944 in his 1995 application and employment from 1942-1946 in his 2003 application. *See Justice v. Island Creek Coal Company*, 11 BLR 1-91 (1988); *Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). As the administrative law judge's finding on the length of coal mine employment is supported by substantial evidence in the record, it is affirmed.

In his consideration of the evidence at Section 718.202(a), the administrative law judge accurately determined that a 1995 x-ray was interpreted as negative for pneumoconiosis by Dr. Sargent, a dually-qualified Board-certified radiologist and B reader, and that a 2004 x-ray was interpreted as negative by Dr. Barrett, also dually-qualified, and by Dr. Prakash, a physician with no notable radiological qualifications. The 2004 x-ray was also read as positive by Dr. Alexander, a dually-qualified physician. Decision and Order at 3-4; Director's Exhibit 10; Claimant's Exhibit 1. The administrative law judge permissibly concluded that the weight of the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on a numerical preponderance of negative interpretations by highly qualified physicians,

and we affirm his findings as supported by substantial evidence. Decision and Order at 7; 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Further, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), (3), as the record contains no autopsy or lung biopsy evidence and the presumptions at 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable.[5]

At Section 718.202(a)(4), the administrative law judge evaluated the medical opinions and treatment records in light of their documentation and reasoning and determined that Dr. Fanney, the miner's treating physician, was the only doctor who provided a clear diagnosis of pneumoconiosis. However, because Dr. Fanney's one-paragraph letter offered no support for his opinion, the administrative law judge permissibly found the report undocumented and unreasoned, and, therefore, entitled to little weight. Decision and Order at 7; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The administrative law judge further acted within his discretion in finding the opinion of Dr. Rao, that the etiology of the miner's lung disease is unclear, "but may be related to coal mining," and the opinion of Dr. Prakash, who diagnosed "pneumoconiosis, possibly," to be equivocal and vague. Decision and Order at 7; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Although Dr. Prakash also diagnosed chronic obstructive pulmonary disease, he did not indicate that the condition was due to the miner's coal mine employment, and therefore it does not constitute a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). Claimant specifically challenges the probative value of the death certificate as well as the administrative law judge's weighing of Dr. Allen's opinion, but we find no error in the administrative law judge's consideration of this evidence, which fails to help claimant establish an affirmative diagnosis of pneumoconiosis or a respiratory impairment arising out of coal mine employment. Consequently, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Adkins*, 958 F.2d 49, 16 BLR 2-61.

[5] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, because the miner was not employed for twenty-five years or more in coal mining, the presumption at 20 C.F.R. §718.306 pertaining to survivor's claims, is also inapplicable.

Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits as to the miner's claim and the survivor's claim.

Accordingly, the administrative law judge's Decision and Order – Denial of 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