BRB Nos. 08-0808 BLA
and 08-0808 BLA-A

A.H. (Widow of L.H.) Claimant-Petitioner Cross-Respondent v. APPALACHIAN MINING INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2009 DECISION and ORDER

Appeal of the Decision and Order Denying Survivor's Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

William S. Mattingly and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for carrier.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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.

PER CURIAM:

Claimant appeals, and carrier cross-appeals, the Decision and Order Denying Survivor's Benefits (2006-BLA-5943) of Administrative Law Judge Larry S. Merck rendered 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).[1] In a decision dated June 17, 2008, the administrative law judge credited the miner with seventeen years of coal mine employment,[2] as stipulated by the parties, and found that employer is the properly designated responsible operator. The administrative law judge further found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Carrier responds, urging affirmance of the administrative law judge's denial of benefits. Carrier also cross-appeals, challenging the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), and the designation of employer as the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal, agreeing with claimant that the administrative law judge erred in his evaluation of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and urging the Board to vacate the administrative law judge's decision, and remand this case for further consideration. The Director also responds to carrier's appeal, agreeing with carrier that the administrative law judge erred in finding that employer is the properly designated responsible operator. The Director urges the Board to dismiss employer as the responsible operator and he concedes that the Black Lung

[1] The miner died on August 29, 2005. Director's Exhibit 14. Claimant filed her survivor's claim on October 17, 2005. Director's Exhibit 2.

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 2, 5. 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*).

Disability Trust Fund (the Trust Fund) would be liable for the payment of any benefits awarded in this case.[3]

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'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. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(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); *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-17 (6th Cir. 2003); *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. *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).

Claimant initially asserts that the administrative law judge erred in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge determined that Dr. Binns, a Board-certified radiologist and B reader, interpreted a January 31, 2003 x-ray as negative for pneumoconiosis. Decision and Order at 12; Employer's Exhibit 1. The administrative law judge further found that a January 30, 2003 x-ray had conflicting readings by Drs. Halbert and Ahmed, both of whom are Board-certified radiologists and B readers, rendering the results inconclusive. Decision and Order at 12. The administrative law judge also found, based on Dr. Zaldivar's uncontradicted reading, that a September 3, 2003 x-ray was negative for pneumoconiosis.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established seventeen years of qualifying coal mine employment, and that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, the administrative law judge found that Dr. Ahmed interpreted an August 29, 2005 x-ray as positive, while Dr. Wiot stated that the same x-ray was "unreadable." Based on the contradictory interpretations by two equally qualified readers, the administrative law judge found that the August 29, 2005 x-ray was inconclusive, and therefore, insufficient to establish the presence of pneumoconiosis. Thus, having found that the record contained two negative x-rays and two inconclusive x-rays, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 13-14.

Claimant specifically contends that the administrative law judge erred in considering Dr. Halbert's "1/1" interpretation of the January 30, 2003 x-ray to be negative for pneumoconiosis, and thus in conflict with Dr. Ahmed's positive reading of the same film. Claimant's Brief at 7. Claimant's assertion has merit. On his report interpreting the January 30, 2003 x-ray, Dr. Halbert found small opacities of size and shape "s/t" and a profusion of "1/1." Director's Exhibit 1 at 227. In an accompanying narrative report interpreting the January 30, 2003, x-ray, Dr. Halbert stated that "[t]here are irregular opacities in the mid and lower lung zones bilaterally which are consistent with those seen in some types of Pneumoconiosis, such as Asbestosis. They are not consistent with Coal Workers' Pneumoconiosis. . . . I see no evidence of Coal Workers' Pneumoconiosis." Director's Exhibit 1 at 228.

In light of Dr. Halbert's narrative comments, the administrative law judge considered Dr. Halbert's interpretation to be negative for the existence of pneumoconiosis. The administrative law judge then noted, correctly, that Dr. Ahmed interpreted the same x-ray as positive for pneumoconiosis. Thus, the administrative law judge concluded that, because "two highly qualified physicians reached contradictory results," the January 30, 2003 x-ray was "inconclusive and not sufficient to establish the existence of pneumoconiosis." Decision and Order at 12. This was error.

As claimant and the Director contend, the administrative law judge should have considered Dr. Halbert's "1/1" reading to be positive for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),[4] and then considered the physician's comments that the opacities "were not consistent with Coal Worker's Pneumoconiosis" at 20 C.F.R. §718.203(b). *See Cranor v. Peabody Coal Co.* 22 BLR 1-1 (1999) (*recon. en banc*); *see also Kiser v. L&J Equip. Co.*, 23 BLR 1-246 (2006); Decision and Order at 12; Claimant's Brief at 7-8; Director's Response to Claimant's Appeal at 3. Accordingly, the administrative law

[4] The regulations provide that an x-ray film that is interpreted as category 1 or greater according to the International Labor Organization's Classification of Radiographs of Pneumoconiosis is considered evidence of pneumoconiosis. 20 C.F.R. §§718.102(b); 718.202(a)(1).

judge's finding that the x-ray evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) is vacated and the case is remanded for further consideration of the x-ray evidence, consistent with *Cranor*.

Claimant next asserts that the administrative law judge erred in finding that Dr. Binns read a January 31, 2003 x-ray, rather than the same January 30, 2003 x-ray that was read by Drs. Halbert and Ahmed, discussed above. Claimant acknowledges that Dr. Binns identified the x-ray he read as having been performed on January 31, 2003, but asserts that close review of the record indicates that Dr. Binns's notation was erroneous, and that all three physicians actually read the same January 30, 2003 x-ray.[5] While the administrative law judge reasonably relied on Dr. Binns's identification of the x-ray he read, in light of our determination to vacate the administrative law judge's evaluation of the x-ray evidence, on remand the administrative law judge should review the record and resolve the conflicting evidence regarding the date of the x-ray read by Dr. Binns. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Claimant also contends that the administrative law judge failed to explain his weighing of the conflicting readings of the August 29, 2005 x-ray. Claimant's Brief at 8. The administrative law judge noted, correctly, that Dr. Ahmed read the August 29, 2005 x-ray as quality "2" and positive for pneumoconiosis, while Dr. Wiot, who is also a Board-certified radiologist and B reader, opined that the film was of such poor quality as to be "unreadable." Decision and Order at 13; Claimant's Exhibit 2; Employer's Exhibit 9. The administrative law judge further noted that an "unreadable" x-ray interpretation may be accorded little or no probative value. The administrative law judge concluded that "[s]ince two highly qualified physicians reached contradictory results," the August 29, 2005 x-ray was "inconclusive and not sufficient to establish the presence of pneumoconiosis." Decision and Order at 13. Claimant asserts that, having apparently found Dr. Wiot's reading to be of no probative value, the administrative law judge did not explain why he did not credit Dr. Ahmed's positive reading, to find the August 29,

[5] Claimant asserts, correctly, that the January 30, 2003 x-ray was taken as part of the January 30, 2003 complete pulmonary evaluation performed by Dr. Mettu. Director's Exhibit 1 at 245-49. The x-ray was interpreted by Dr. Halbert on the following day, January 31, 2003. Director's Exhibit 1 at 227-229. It appears, however, that when Dr. Barrett read the same x-ray for quality purposes, he indicated that it had been performed on January 31, 2003. Director's Exhibit 1 at 222. The next exhibit in the record is Dr. Binns's reading of an x-ray that he, too, identified as having been performed on January 31, 2003. Director's Exhibit 1 at 216-17. In addition, the district director's Proposed Decision and Order stated that the x-ray performed during Dr. Mettu's examination had been read by Drs. Halbert, Barrett, and Binns. Director's Exhibit 1 at 160.

2005 x-ray to be positive. Claimant's Brief at 8. Contrary to claimant's contention, as the Director asserts, since two equally qualified readers offered conflicting opinions as to whether the film was of suitable quality for interpretation, the administrative law judge permissibly found the August 29, 2005 x-ray to be inconclusive. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor*, 22 BLR at 1-7; Decision and Order at 13; Director's Response to Claimant's Appeal at 4.

Claimant next challenges the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically contends, and the Director agrees, that the administrative law judge's evaluation of the x-ray evidence influenced his weighing of the medical opinions of Drs. Workman and Jarboe. Claimant's Brief at 8; Director's Response to Claimant's Appeal at 5 n.6. Claimant's contention has merit.[6]

The administrative law judge discredited the opinion of Dr. Workman, that the miner suffered from clinical and legal pneumoconiosis, in part because Dr. Workman based his conclusions on a positive x-ray reading that was contrary to the administrative law judge's own evaluation of the x-ray evidence. Decision and Order at 21; Director's Exhibit 24; Claimant's Exhibit 1. Conversely, the administrative law judge credited the opinion of Dr. Jarboe, that the miner did not suffer from coal workers' pneumoconiosis or any coal dust-related disease, in part because Dr. Jarboe explained how the objective evidence of record, including the negative x-rays, supported his conclusions. Decision and Order at 25-27; Employer's Exhibits 4, 10. Because we have vacated the administrative law judge's evaluation of the x-ray evidence, we must also vacate the administrative law judge's evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge should reconsider the medical opinions after he has reweighed the x-ray evidence of record.

In light of our determination to vacate the administrative law judge's evaluation of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also address carrier's contention, raised on cross-appeal, that the administrative law judge erred in discrediting the opinion of Dr. Zaldivar. Employer's Brief at 31. Dr. Zaldivar opined that the miner did not suffer from clinical or legal pneumoconiosis, but instead suffered from bullous emphysema due to cigarette smoking.

[6] As claimant has not challenged the administrative law judge's determinations to discount the probative value of the miner's death certificate, and to credit Dr. Wiot's negative reading of an October 2, 2002 computerized tomography scan, these findings are affirmed. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

Employer's Exhibit 5. Dr. Zaldivar added that "bullae [are] never a manifestation" of coal workers' pneumoconiosis or coal dust exposure. Employer's Exhibits 5, 7 at 20. In considering Dr. Zaldivar's conclusions, the administrative law judge found:

> Although Dr. Zaldivar opines that bullae emphysema can never be caused by coal dust exposure, he does not sufficiently address whether bullae emphysema can be significantly related to or substantially aggravated by exposure to coal dust. Accordingly, I find Dr. Zaldivar's opinion regarding legal pneumoconiosis not well-reasoned and grant it less weight.

Decision and Order at 25. As carrier contends, however, during his deposition, Dr. Zaldivar opined that the miner did not have any chronic dust disease of the lungs caused by, significantly related to, or substantially aggravated by, his coal dust exposure. Employer's Exhibit 7 at 29. Therefore, on remand, the administrative law judge should reconsider his determination that Dr. Zaldivar failed to adequately explain his opinion that claimant did not suffer from legal pneumoconiosis, in light of Dr. Zaldivar's deposition testimony. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Finally, we address carrier's assertion, on cross-appeal, that the administrative law judge erred in finding that employer is the responsible operator liable for payment of any benefits awarded. Carrier contends that another operator more recently employed the miner for at least one year. Carrier's Brief at 21. Thus, carrier asserts that employer should be dismissed as the responsible operator and liability for the payment of benefits should be transferred to the Trust Fund. Carrier's Brief at 22-29. The Director agrees that a different operator should have been designated as the responsible operator in this case, and urges the Board to dismiss employer as the responsible operator. Director's Response to Carrier's Cross-Appeal at 4-5. Moreover, the Director concedes that the Trust Fund is liable for the payment of any benefits awarded in this case. Director's Response to Carrier's Cross-Appeal at 5. In light of the Director's concession, we reverse the administrative law judge's finding that employer is the properly designated responsible operator, and dismiss employer as a party to this case. *See generally Bucshon v. Peabody Coal Co.*, 4 BLR 1-608 (1982).

Accordingly, the administrative law judge's Decision and Order Denying Survivor's Benefits is reversed with regard to the responsible operator finding. With respect to the merits of entitlement, the administrative law judge's decision is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge