

BRB No. 07-0577 BLA

E.C. for the Estate of A.J.,)	
Widow of C.J.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
H.D. COAL COMPANY)	DATE ISSUED: 03/13/2008
)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order–Denial of Benefits (2005-BLA-6058) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), rendered 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). The administrative law judge found that the miner had twenty years of qualifying coal mine employment, Decision and Order at 3; Director’s Exhibit 36, but that claimant failed to prove that the miner had pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Because pneumoconiosis, a threshold finding in a survivor’s claim, was not established, the

administrative law judge found it unnecessary to determine whether the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Benefits were, accordingly denied.

On appeal, claimant contends that the administrative law judge improperly weighed the x-ray and medical opinion evidence at Section 718.202(a)(1),(4) in finding that claimant failed to establish pneumoconiosis.¹ Claimant also contends that the evidence established that pneumoconiosis hastened the miner's death at Section 718.205(c). In response, employer urges affirmance of the Decision and Order—Denial of Benefits. The Director, Office of Workers' 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 rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 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). In a survivor's claim 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, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption at 20 C.F.R. §718.304 is available, based on a finding of complicated pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

¹ The administrative law judge's finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), (3) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² The law of the United States Court of Appeals for the Sixth Circuit is applicable, because the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is rational, supported by substantial evidence, and consistent with applicable law. It must, therefore, be affirmed. In considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge noted that all of the x-ray evidence of record was contained within the miner's treatment and hospitalization records³, 20 C.F.R. §725.414(a)(4), and that the interpretations made therein were for the purpose of treating the miner's heart condition, and not to diagnose pneumoconiosis. Decision and Order at 5, n.6. Further, the administrative law judge found that none of the x-ray readers' qualifications were in the record, that no mention was made of the quality of the films read, and that none of the readings provided the required ILO classification. Decision and Order at 5, n.6. Thus, the administrative law judge properly found that none of the x-ray evidence of record was in compliance with the quality standards set forth at 20 C.F.R. §718.102(b) and Appendix A of Part 718. The administrative law judge, therefore, found that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1) and we affirm that finding. 20 C.F.R. §§718.102, 718.202.

In considering the medical opinions and the hospitalization and treatment records at Section 718.202(a)(4), the administrative law judge found that the only medical opinions of record, rendered by Drs. Rosenberg⁴ and Vuskovich,⁵ concluded that the

³ The administrative law judge considered the pertinent records of the miner's hospitalization and treatment at Lexington Clinic and St. Joseph's Hospital from September 21, 1990 through July 14, 1999, when the miner died. The administrative law judge noted that these records contained a history of the miner's treatment for cardiac problems and aortic stenosis, including electrocardiograms, cardiac catheterization, aortic valve replacement and coronary artery bypass grafting.

⁴ The administrative law judge found that Dr. Rosenberg, on reviewing the miner's death certificate and the medical records from the Lexington Clinic and St. Joseph's Hospital, noted that the miner had a twenty year coal mine employment history but that the records did not contain any pulmonary function studies and that all of the chest x-rays in the record revealed clear lung fields and postoperative findings related to the miner's valve replacement surgery. Employer's Exhibit 1. Additionally, the administrative law judge noted that Dr. Rosenberg found that the miner's death was due to complications of a second aortic valve replacement with excessive bleeding and deterioration of vascular structures. Employer's Exhibit 1; Decision and Order at 5, 10.

⁵ The administrative law judge found that Dr. Vuskovich prepared a report in which he summarized the medical records and found that the miner's death was not due to any chronic obstructive pulmonary disease, but was rather a cardiac death. Employer's Exhibit 2. Dr. Vuskovich concluded that there was no evidence to support a finding of

miner did not have either clinical or legal pneumoconiosis. The administrative law judge found that the opinions of these physicians were well-reasoned as they were supported by underlying documentation and the doctors discussed the medical evidence they had reviewed. Decision and Order at 10; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge found that there were no contrary opinions in the record and that the only mention of pneumoconiosis was in the miner's hospitalization and treatment records which contained two statements that the miner had a history of black lung.⁶ The administrative law judge noted, however, that these records did not discuss or reference objective evidence or other support for those statements. Decision and Order at 10; *see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). The administrative law judge concluded, therefore, that the medical opinions and hospitalization and treatment records failed to establish pneumoconiosis at Section 718.202(a)(4). The administrative law judge's finding thereunder is affirmed.

Because the administrative law judge properly found that claimant failed to establish pneumoconiosis at Section 718.202(a), a threshold determination in a claim for survivor's benefits, the administrative law judge properly found that he did not need to consider the issue of death due to pneumoconiosis at Section 718.205(c). Decision and Order at 10-11; *see Trumbo*, 17 BLR at 1-87-88.

pneumoconiosis, or any other lung impairment caused by coal dust exposure. Employer's Exhibit 2.

⁶ The administrative law judge noted that the admitting report to St. Joseph's Hospital on July 13, 1999, stated that the miner had a history of black lung. Director's Exhibit 14. The administrative law judge further noted that, in a record summarizing the miner's death, Dr. Thomas Donohue stated that the miner had a history of black lung. Director's Exhibit 14.

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

BETTY JEAN HALL
Administrative Appeals Judge