

BRB No. 07-0578 BLA

D.H.)
(Widow of L.H.))
)
Claimant-Petitioner)
)
v.)
)
MOUNTAIN CLAY, INCORPORATED)
)
and)
) DATE ISSUED: 03/27/2008
JAMES RIVER COAL COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and 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 – Denying Benefits (2005-BLA-05678)
of Administrative Law Judge Joseph E. Kane 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).¹ The administrative law judge credited the miner with fourteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.² The administrative law judge found that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and 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 both claims.

On appeal, claimant contends that the administrative law judge erred in finding the evidence to be insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Claimant also challenges the administrative law judge's finding that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c)(2). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the widow of the deceased miner.

² The miner filed a claim for benefits on November 27, 2002. Director's Exhibit 2. This claim was denied by the district director on October 10, 2003. Director's Exhibit 16. The miner requested a hearing and the claim was transferred to the Office of Administrative Law Judges on December 12, 2003. Director's Exhibits 17, 21. The miner died on December 16, 2003. Director's Exhibit 31. Claimant filed her application for survivor's benefits on January 26, 2004. Director's Exhibit 24. The miner's claim was remanded to the district director for consolidation with the pending survivor's claim. Director's Exhibit 22.

³ We affirm the administrative law judge's finding of fourteen years of coal mine employment and his findings that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) and that the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (3), as they are not challenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10, 12, 13.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to survivor's benefits, 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.⁵ *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *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). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *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 to benefits. *Anderson v. Valley*

the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3, 25.

⁵ Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- ...
- (5) 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).

Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant asserts that the administrative law judge erred in his consideration of the x-ray evidence at Section 718.202(a)(1) because he “may have selectively analyzed” the evidence. Claimant’s Brief at 3. Claimant further contends that it was improper for the administrative law judge to rely upon the physicians’ qualifications and the numerical superiority of the negative x-ray interpretations for pneumoconiosis. *Id.* Claimant’s allegations of error are without merit.

Section 718.202(a)(1) specifically provides that “where two or more [x]-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such [x]-rays.” 20 C.F.R. 718.202(a)(1); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U. S. 267, 18 BLR 2A-1 (1994). Pursuant to Section 718.202(a)(1), the administrative law judge considered all of the relevant x-ray evidence of record consisting of four readings of two x-rays dated May 8, 2003 and November 19, 2003, which were submitted for consideration in both the miner’s and survivor’s claim.⁶ Director’s Exhibits 9, 22, 44; Employer’s Exhibit 2. The administrative law judge correctly found that the May 8, 2003 x-ray was read as positive by Dr. Simpao, who holds no radiological qualifications, and negative by Dr. Wiot, a Board-certified radiologist and B reader.⁷ Decision and Order at 10, 12; Director’s Exhibits 9, 22, 44. Because the administrative law judge properly considered Dr. Wiot to be more qualified than Dr. Simpao, he permissibly assigned controlling weight to Dr. Wiot’s negative reading in finding that the May 8, 2003 x-ray was negative for the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 10. Moreover, the administrative law judge correctly found that the two interpretations of the November 19, 2003 x-ray, by Dr. Dahhan, a B reader, and Dr. Poulos, a Board-certified radiologist and B reader, were negative for pneumoconiosis. Decision and Order at 10. Because substantial evidence supports the administrative law judge’s finding that claimant failed

⁶ In addition, Dr. Barrett, a B reader and Board-certified radiologist, interpreted claimant’s May 8, 2003 x-ray for quality purposes only. Director’s Exhibits 9, 44.

⁷ A B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. *See* 42 C.F.R. §37.51. A Board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(c)(ii).

to establish the existence of pneumoconiosis based on the x-ray evidence, we affirm the administrative law judge's finding pursuant to Section 718.202 (a)(1) in both the miner's claim and the survivor's claim.

With respect to Section 718.202(a)(4), claimant asserts that the administrative law judge erred in failing to give controlling weight to Dr. Simpao's opinion that the miner suffered from coal workers' pneumoconiosis category 1/0 and a mild pulmonary impairment, consistent with coal dust exposure. Claimant's Brief at 4. We disagree. The administrative law judge correctly noted that the miner's claim included three medical opinions. He found that Dr. Simpao based his diagnosis of pneumoconiosis on the x-ray evidence, the miner's history of coal dust exposure, the results of a pulmonary function test, the miner's symptoms and a physical examination. Decision and Order at 11; Director's Exhibit 9. As noted by the administrative law judge, Dr. Dahhan opined that the miner did not have pneumoconiosis, and he specifically attributed the miner's respiratory impairment to lung cancer due to smoking. Director's Exhibits 11, 22. The administrative law judge found that Dr. Dahhan's opinion was based on his review of the x-ray evidence, the pulmonary function testing showing a reversible obstructive defect and the miner's physical examination. Decision and Order at 7. Lastly, the administrative law judge correctly noted that Dr. Vuskovich provided a consultative report based on his review of "other medical evidence in the record," including x-rays, CT scans and pulmonary function testing. Decision and Order at 7; Employer's Exhibit 1. Dr. Vuskovich opined that the miner did not have pneumoconiosis or any dust-related lung condition. Employers' Exhibit 1. Dr. Vuskovich also attributed the miner's respiratory impairment to lung cancer. *Id.*

Contrary to claimant's contention, in weighing the medical opinion evidence at Section 718.202(a)(4), the administrative law judge did not reject Dr. Simpao's opinion; rather, he found Dr. Simpao's diagnosis of pneumoconiosis to be well-reasoned and well-documented.⁸ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 11. However, the administrative law judge also considered the opinions of Dr. Dahhan and Dr. Vuskovich, that the miner did not have pneumoconiosis, to be well-reasoned and well-documented. Decision and Order at 11. Because the administrative law judge acted within his discretion in finding that the conflicting medical opinions were credible, but

⁸ Claimant generally states that an administrative law judge may not discredit the opinion of a physician whose report is based on a positive x-ray interpretation that is contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). Claimant's Brief at 4. Claimant also contends that the administrative law judge "appears" to have substituted his opinion for that of Dr. Simpao. Claimant's Brief at 5.

equally probative as to whether the miner suffered from pneumoconiosis, the administrative law judge permissibly found that claimant failed to establish, by a preponderance of the evidence, that the miner had pneumoconiosis pursuant to Section 718.202(a)(4).⁹ *Id.* Where the credible evidence is equally divided, it is considered to be in equipoise and claimant fails to carry her burden. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. We, therefore, affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the evidence submitted for consideration in the miner's and survivor's claims did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement in both claims, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718 in these claims. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, we need not address claimant's remaining contention that the administrative law judge erred in his consideration of the issue of death due to pneumoconiosis pursuant to Section 718.205(c)(2). *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁹ The administrative law judge considered all of the evidence designated by the parties with respect to the survivor's claim at 20 C.F.R. § 718.202(a)(4), which consisted of the medical opinions of Dr. Simpao and Dr. Dahhan, the miner's hospital and treatment records and the miner's death certificate. The administrative law judge found that the hospital and treatment "records are of little relevance" because they failed to indicate that the miner suffered from pneumoconiosis, and while there were some diagnoses of chronic bronchitis, none of the physicians related the miner's condition to coal dust exposure. Decision and Order at 8; Director's Exhibits 33, 34. The administrative law judge also found that the death certificate listed the cause of the miner's death as cardiac failure and metastatic lung cancer. Decision and Order at 8; Director's Exhibit 31.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge