

BRB No. 01-0764 BLA

BEVERLY J. CHAMBERS )  
(Widow of RAYMOND CHAMBERS) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
OLD HICKORY COAL COMPANY )  
 )  
and )  
 )  
WEST VIRGINIA COAL-WORKERS' )  
PNEUMOCONIOSIS FUND ) )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' ) DATE ISSUED: \_\_\_\_\_  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant<sup>1</sup> appeals the Decision and Order (00-BLA-0625) of Administrative Law Judge Robert J. Lesnick denying benefits 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).<sup>2</sup> The administrative law judge credited the miner with twenty years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 6. Decision and Order at 10. Applying the amended regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 12. Because the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, he also found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), (c)(5). Decision and Order at 12. Accordingly, benefits were denied.

---

<sup>1</sup>Claimant is Beverly J. Chambers, the widow of the miner, Raymond Chambers, who filed her claim for benefits on September 30, 1998. Director's Exhibit 1. The miner filed two claims for benefits. The miner's first claim for benefits, filed on January 27, 1977, was finally denied on June 6, 1980. Director's Exhibits 27-1, 27-13. The miner's second claim was filed on May 28, 1993, and there does not appear to be a final denial of that claim in the record. Director's Exhibits 28-1, 29.

<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis based on all the evidence of record pursuant to 20 C.F.R. §718.202(a). Claimant's Brief at 4-5. Carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in weighing the autopsy and biopsy evidence of clinical pneumoconiosis with the medical opinion evidence of legal pneumoconiosis at 20 C.F.R. § 718.202(a).<sup>3</sup> Director's Letter at 1-2.<sup>4</sup>

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 applicable law, they are binding upon this Board and may not be disturbed. 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).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant

---

<sup>3</sup>We reject the Director's assertion inasmuch as the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, stated in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) that an administrative law judge need not distinguish between medical and legal pneumoconiosis when weighing all of the medical evidence together at 20 C.F.R. §718.202(a).

<sup>4</sup>We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment and pursuant to 20 C.F.R. §718.202(a)(3), as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. Pursuant to Section 718.202(a), the administrative law judge weighed all the evidence together and found that claimant failed to establish the existence of pneumoconiosis. Decision and Order at 12. In doing so, the administrative law judge first noted that "there is no x-ray evidence in this claim for benefits and the presumptions of §§718.304, 718.305, and 718.306 are inapplicable."<sup>5</sup> *Id.* The administrative law judge next stated that he found that claimant established pneumoconiosis by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), but failed to establish pneumoconiosis "by a preponderance" of the autopsy and biopsy evidence. *Id.* The administrative law judge permissibly found the autopsy and biopsy evidence to be more reliable than the medical opinion evidence in determining the existence of pneumoconiosis. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Therefore, the administrative law judge concluded "weighing all of these factors together, I find that claimant has failed to establish by the preponderance of the available medical evidence that the miner suffered from pneumoconiosis." *Id.*

Contrary to claimant's contention, the administrative law judge did not err in weighing all of the evidence together in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Claimant's Brief at 5-7. Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found the autopsy and biopsy evidence of record to be in equipoise.<sup>6</sup> Therefore, the administrative law judge, citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub*

---

<sup>5</sup>The administrative law judge failed to consider the chest x-ray evidence contained in the record. Decision and Order at 10, 12. However, we deem such error harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as these x-rays do not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See* 20 C.F.R. §§718.102(b) (2000), 718.202(a)(1); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990).

<sup>6</sup>The administrative law judge properly noted that Dr. Gagucas found the autopsy evidence revealed that the miner suffered from moderate coal workers' pneumoconiosis and that Dr. Caldwell made no mention of pneumoconiosis in his biopsy findings. Director's Exhibits 9, 10. The administrative law judge additionally noted that, after reviewing the biopsy and autopsy evidence, Dr. Green found pneumoconiosis whereas Dr. Hansbarger did not. Claimant's Exhibit 1; Employer's Exhibit 1.

*nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), found that claimant failed to establish the existence of pneumoconiosis by a preponderance of the autopsy and biopsy evidence. Decision and Order at 11. Because the administrative law judge found this evidence to be in equipoise and more reliable than medical opinion evidence, claimant failed to meet her burden of proof in establishing the existence of pneumoconiosis. *See Ondecko, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I concur:

---

ROY P. SMITH  
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I agree with claimant and the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis because he misapplied the teaching of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211

F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge found that claimant had established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) by the preponderance of the medical opinion evidence but that the autopsy - biopsy evidence was in equipoise. 20 C.F.R. §718.202(a)(2). The administrative law judge determined that because the autopsy - biopsy evidence is the most reliable evidence to show the existence of pneumoconiosis, when this evidence was considered together with the medical opinion evidence pursuant to *Compton*, the preponderance of the evidence did not establish the existence of pneumoconiosis. Decision and Order at 12. The administrative law judge plainly overlooked the *Compton* court's insistence on the "meaningful distinction between evidence of medical pneumoconiosis and evidence of legal pneumoconiosis. . . ." *Compton*, 211 F.3d at 211, 22 BLR at 2-174. Moreover, the court had cautioned against the kind of analysis which the administrative law judge followed in the case at bar: weighing negative (or inconclusive) evidence of medical pneumoconiosis (such as autopsy and biopsy evidence) against positive evidence of legal pneumoconiosis (medical opinion evidence).<sup>7</sup> Because the administrative law judge's weighing of the evidence relevant to the existence of pneumoconiosis does not reflect the kind of thoughtful analysis contemplated by the *Compton* court, I would vacate the Decision and Order - Denying Benefits and remand the case for reconsideration of the medical evidence in light of *Compton*.

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

<sup>7</sup>The court declared:

[T]he Director's point is well-taken: Evidence that does not establish medical pneumo-coniosis, *e.g.*, an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis.

*Compton*, 211 F.3d at 210, 22 BLR at 2-173 (footnote omitted).