

BRB No. 05-0331 BLA

BONNIE HOLBROOK)	
(Wife of RUFUS M. HOLBROOK))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
H & D COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	DATE ISSUED: 10/24/2005
)	
Employer/Carrier-)	
Respondent)	
)	
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.

James D. Holliday, Hazard, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (03-BLA-0135 and 03-BLA-5629) of Administrative Law Judge Joseph E. Kane on claims 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). This case involves both a miner’s and survivor’s claim.² The administrative law judge credited the miner with thirty-two years of coal mine employment and found that the miner’s claim was timely filed. The administrative law judge determined that the miner had a remote smoking history which ceased ten to twenty years ago, lasting approximately thirty years, and consisting of one to two packs per day. The administrative law judge noted that employer conceded that the biopsy evidence establishes the existence of simple pneumoconiosis, and found that the evidence does not rebut the presumption that this condition arose out of coal mine employment. The administrative law judge next found that claimant failed to establish that the miner was totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis employment pursuant to 20 C.F.R. §§718.202, 718.203, 718.204. Accordingly, the administrative law judge denied benefits on the miner’s claim.

Regarding the survivor’s claim, the administrative law judge found that since the claim was filed after January 19, 2001, the evidentiary limitations contained in 20 C.F.R. §725.414 are applicable. The administrative law judge determined that claimant failed to establish 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 the survivor’s claim.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) or a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to Section 718.204(c)(1). Additionally, claimant argues that the administrative law judge considered the survivor’s claim under the incorrect regulations, failed to properly consider Dr. Alam’s report, and erred by relying on the

¹ Claimant is the widow of the miner, who died on January 28, 2001. Director’s Exhibits 8, 55.

² The miner’s claim was filed on October 2, 2000. Director’s Exhibit 1. The miner died on January 28, 2001. On April 4, 2001, claimant filed a survivor’s claim. Director’s Exhibit 46. On November 26, 2001, an administrative law judge issued an Order of Remand to the district director for the purpose of substituting Bonnie Holbrook on behalf of Rufus Holbrook in the miner’s claim and for consolidation with the survivor’s claim. Director’s Exhibit 45.

opinions by Drs. Fino and Rosenberg, which reference x-ray readings in excess of the limitations in Section 725.414. Employer responds, urging affirmance of the denial of benefits on both claims. The Director, Office of Workers' Compensation Programs, declines to make a substantive response, but indicates by footnote that any error by the administrative law judge in admitting the medical reports by Drs. Fino and Rosenberg referencing inadmissible x-ray readings was harmless in the circumstances of this particular case, because the doctors agreed that the miner had pneumoconiosis.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 rational, supported by substantial evidence, and in accordance with applicable law. 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 benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *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 the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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); *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).

³ The administrative law judge's findings regarding the length of coal mine employment, smoking history, and that claimant established the existence of simple pneumoconiosis by biopsy are affirmed as unchallenged on appeal. The administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis is also affirmed as unchallenged. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In the miner's claim, pursuant to Section 718.204(c)(1), the administrative law judge discounted the medical opinions of Drs. Alam and Breeding that the miner was totally disabled due to complicated pneumoconiosis, because the administrative law judge found that the miner did not suffer from complicated pneumoconiosis. Decision and Order at 33, 36. Claimant alleges no error with respect to the administrative law judge's weighing of Dr. Breeding's opinion at Section 718.204(c)(1). Claimant's Brief at 18-19.

Regarding the administrative law judge's weighing of Dr. Alam's opinion, claimant contends only that the administrative law judge should have considered and weighed Dr. Alam's status as a treating physician. Claimant's Brief at 17-18. Review of the administrative law judge's Decision and Order reflects that he considered Dr. Alam's status as the miner's treating physician. Decision and Order at 11-12, 29. However, contrary to claimant's suggestion, the administrative law judge was not required to accord greater weight to Dr. Alam's opinion because of his status as a treating physician, but had to weigh the opinion based on its own credibility in the context of the entire record. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 511-13, 22 BLR 2-625, 2-640-47 (6th Cir. 2003); *see* 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge permissibly discredited Dr. Alam's opinion because Dr. Alam premised his opinion regarding the cause of the miner's disability on a mistaken diagnosis of complicated pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); Claimant's Exhibits 3-5. Since claimant does not challenge the administrative law judge's basis for discounting the opinions by Drs. Alam and Breeding, we affirm the administrative law judge's finding that claimant failed to establish that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(c)(1). 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Because claimant failed to establish that the miner was totally disabled due to pneumoconiosis, an essential element of entitlement in the miner's claim, we affirm the administrative law judge's denial of benefits on the miner's claim. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

In the survivor's claim, the administrative law judge accorded no weight to Dr. Breeding's opinion that complicated pneumoconiosis substantially contributed to the miner's death because the administrative law judge found that the miner did not suffer from complicated pneumoconiosis. Decision and Order at 40-41. Claimant does not challenge this finding and it is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6

BLR 1-710, 1-711 (1983). The administrative law judge found that Dr. Alam's opinion⁴ that pneumoconiosis contributed to the miner's death was not well-documented for three reasons: the miner's objective tests did not indicate the level of impairment described by Dr. Alam, there was no evidence of complicated pneumoconiosis, and Dr. Alam provided no support for his opinion that even if the miner had only simple pneumoconiosis, people with simple pneumoconiosis have a greater risk of contracting tuberculosis. Decision and Order at 41. Claimant contends that the administrative law judge erred in characterizing the miner's pulmonary function and blood gas studies as "normal." Claimant's Brief at 23-24. We need not address this contention, because the other two reasons the administrative law judge gave were valid. See *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). He permissibly discounted Dr. Alam's opinion that complicated pneumoconiosis contributed to the miner's death because the administrative law judge found that the record did not establish the existence of complicated pneumoconiosis. *Trujillo*, 8 BLR at 1-473; Claimant's Exhibit 3. Additionally, the administrative law judge was within his discretion to find that Dr. Alam did not support his reasoning concerning the causative link between simple pneumoconiosis and tuberculosis with any medical studies or literature. See *Williams*, 338 F.3d at 511-13, 22 BLR at 2-640-47; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Claimant's Exhibit 5.

Because the administrative law judge permissibly discounted the only medical evidence supportive of claimant's burden of proof, we affirm the administrative law judge's finding pursuant to Section 718.205(c). Consequently, we need not address claimant's contention that the administrative law judge cited the wrong regulations and erred in admitting two of employer's medical reports that referenced inadmissible evidence. Error, if any, in the administrative law judge's analysis of these issues would be harmless in light of our affirmance of his finding that claimant's evidence failed to establish that pneumoconiosis hastened the miner's death. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁴ Dr. Alam opined that the miner's coal worker's pneumoconiosis was a major contributing factor in his death because of pulmonary fibrosis, secondary to the miner's long history of dust exposure. Dr. Alam stated that the diagnosis of pulmonary fibrosis in a patient with nearly thirty years of dust exposure points towards complicated coal worker's pneumoconiosis with large opacities. Claimant's Exhibit 3. Dr. Alam's rationale for believing that pneumoconiosis contributed to the miner's death was that the miner suffered from tuberculosis and people with coal worker's pneumoconiosis have a greater risk of contracting tuberculosis. Claimant's Exhibit 3.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge