

BRB No. 09-0341 BLA

P.W.)
)
 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY) DATE ISSUED: 10/15/2009
)
 and)
)
 OLD REPUBLIC INSURANCE 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 Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

P.W., Plummerville, Arkansas, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (06-BLA-5319) of Administrative Law Judge Clement J. Kennington

on a survivor's claim¹ that was 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 credited the miner with eight years of qualifying coal mine employment. Adjudicating the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's Decision and Order Denying Benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).²

¹ Claimant filed a survivor's claim for benefits on March 29, 2005, on behalf of the miner's two adult disabled children. Director's Exhibit 2. The miner died on February 15, 1993. Director's Exhibit 9.

² The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner's last coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 15.

After consideration of the administrative law judge's Decision and Order Denying Benefits and the evidence of record, we conclude that the administrative law judge's decision is rational, supported by substantial evidence, and in accordance with law. It is, therefore, affirmed.³ Relevant to Section 718.202(a)(1), the administrative law judge correctly found that the two x-ray films of record, dated January 25, 1993 and February 4, 1993, were read as negative for the existence of pneumoconiosis. Accordingly, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 7; Director's Exhibit 11. Further, a review of the record reveals that there is no biopsy or autopsy evidence in the record; hence, the administrative law judge properly found that the existence of pneumoconiosis could not be established under Section 718.202(a)(2), and that finding is affirmed. *See* Decision and Order at 7.⁴

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that there are three physicians' opinions of record. During the miner's last hospitalization, Dr. Buchanan, the miner's treating physician, diagnosed chronic obstructive pulmonary disease with acute exacerbation and stated, "[t]he patient also suffered from pneumoconiosis which is not documented on his chest x-ray." Director's Exhibit 11. Dr. Buchanan completed the death certificate and listed "[b]lack lung disease" as a significant contributing cause of the miner's death.⁵ Director's Exhibit 9. After

³ Initially, we note that claimant appeared at the formal hearing before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 1-27.

⁴ While the administrative law judge did not address whether pneumoconiosis was established under 20 C.F.R. §718.202(a)(3), a review of the record reveals that none of the presumptions set forth in Section 718.202(a)(3) are applicable in this case. The record contains no evidence establishing that the miner had complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the instant claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305; and the miner died after March 1, 1978, *see* 20 C.F.R. §718.306.

⁵ Dr. Buchanan completed the miner's death certificate and listed, as the immediate causes of death: cerebral vascular accident with cardiovascular respiratory collapse and pneumonia. Director's Exhibit 9.

conducting a review of the medical records, Drs. Renn and Tuteur opined that there is no evidence to indicate that the miner had coal workers' pneumoconiosis or any other coal mine dust-induced disease process. Director's Exhibit 12; Employer's Exhibit 1. Drs. Renn and Tuteur similarly reiterated these conclusions during their depositions held on February 8, 2007 and June 17, 2008, respectively. Employer's Exhibits 2, 3.

The administrative law judge permissibly found that the opinion of Dr. Buchanan, contained in both his report and the death certificate, was entitled to little weight because Dr. Buchanan failed to provide any rationale or explanation for his diagnosis of pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 7. Specifically, the administrative law judge properly found that the probative value of Dr. Buchanan's opinion was undermined based on the absence of x-ray evidence documenting the presence of pneumoconiosis, the absence of an autopsy to substantiate the diagnosis, and the absence of any discussion or testimony by Dr. Buchanan providing the underlying documentation supporting his conclusion. *See Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR 2-399, 2-407 (7th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7; Director's Exhibit 11. Accordingly, the administrative law judge rationally found that Dr. Buchanan's opinion was neither well-reasoned nor well-documented. *See* 20 C.F.R. §718.104(d)(5); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *Railey*, 972 F.2d at 181, 16 BLR at 2-125-126; *see generally Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001) (court disapproved of the mechanical rule that the opinion of a treating physician prevail solely because the physician treated the miner). In addition, the administrative law judge, within a proper exercise of his discretion, found that the death certificate listing "[b]lack lung disease" as a significant cause of death was, in and of itself, insufficient to establish the existence of pneumoconiosis due to the absence of any further explanation provided by Dr. Buchanan. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-262 (4th Cir. 2000); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 7; Director's Exhibit 9. On the contrary, the administrative law judge properly found that the opinions of Drs. Renn and Tuteur, who are both Board-certified in internal medicine and pulmonary disease, were well-reasoned and well-documented opinions, as they each conducted a full review of the medical evidence of record, delineated their findings in their deposition testimonies, and adequately set forth the reasons for their conclusions, that there was insufficient evidence to justify a diagnosis of pneumoconiosis. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); *see generally McCandless*, 255 F.3d at 469, 22 BLR at 2-318 ("The [administrative law judge] must have a medical reason for preferring one

physician's conclusion over another's."). Consequently, the administrative law judge rationally determined that the opinions of Drs. Renn and Tuteur were more reliable regarding the existence of pneumoconiosis, as both physicians rendered well-reasoned and well-documented opinions. *See King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-48; *Carpeta*, 7 BLR at 1-147 n.2; Decision and Order at 8; Director's Exhibit 12; Employer's Exhibit 1-3. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his crediting of the opinions of Drs. Renn and Tuteur over the contrary opinion of Dr. Buchanan pursuant to Section 718.202(a)(4) and, accordingly, affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), as this finding is rational, supported by substantial evidence and in accordance with law. Because claimant has failed to satisfy her burden of establishing the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded. *See* 20 C.F.R. §718.202(a); *Trumbo*, 17 BLR at 1-87-88.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge