

BRB No. 14-0289 BLA

LOIS JEAN BELCHER)	
(Widow of CHARLES H. BELCHER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PIKEVILLE COAL COMPANY)	DATE ISSUED: 10/06/2014
)	
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 on Remand of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2010-BLA-5485) of Administrative Law Judge Theresa C. Timlin denying benefits on a survivor's claim filed

on July 1, 2009,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time. In her original Decision and Order, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and credited the miner with thirty-two years of coal mine employment, based on the parties' stipulation. Addressing the merits, the administrative law judge found the medical evidence insufficient to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2) and, therefore, she found that the rebuttable presumption of death due to pneumoconiosis, set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), does not apply.² The administrative law judge further found that claimant did not establish that the miner had either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, thus, did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge for further consideration. *Belcher v. Pikeville Coal Co.*, BRB No. 11-0784 BLA (Aug. 16, 2012) (unpub.). The Board affirmed the administrative law judge's finding that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b) and, therefore, claimant failed to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4). *Id.*, slip op. at 4-5. Additionally, the Board affirmed the administrative law judge's finding that the medical opinion evidence was insufficient to establish legal pneumoconiosis

¹ Claimant is the widow of the miner, Charles Belcher, who died on May 26, 2006. Director's Exhibit 10. The miner filed a claim for benefits on June 10, 1987, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. on August 2, 1991. Director's Exhibit 1. The Board affirmed the denial of benefits on September 28, 1992. *Belcher v. Pikeville Coal Co.*, BRB No. 91-2062 BLA (Sept. 28, 1992)(unpub.).

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

pursuant to Section 718.202(a)(4), as supported by substantial evidence.³ *Id.*, slip op. at 5. However, because the administrative law judge relied on x-ray and CT scan evidence not admitted into the record, the Board vacated her finding that the medical evidence was insufficient to establish clinical pneumoconiosis pursuant to Section 718.202(a), and remanded the case to the administrative law judge for further proceedings. *Id.* at 6.

On remand, the administrative law judge stated that she was excluding the readings by Dr. Jarboe of the April 19, 2006 and May 20, 2006 x-ray films, as well as his interpretation of the April 16, 2006 CT scan, in light of the Board's remand instructions. The administrative law judge then found that the medical evidence of record was insufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a). Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant challenges the administrative law judge's denial of benefits, arguing that she erred in weighing the conflicting medical evidence of record. Claimant contends that the CT scan evidence alone is sufficient to establish the existence of clinical pneumoconiosis and, therefore, the administrative law judge erred in weighing the entirety of the medical evidence together pursuant to Section 718.202(a), in contravention of the Board's remand instructions. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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.⁴ 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 under 20 C.F.R. Part 718, unassisted by the amended Section 411(c)(4) presumption, claimant must establish that

³ In addition, the Board affirmed, as unchallenged by the parties, the administrative law judge's decision to credit the miner with thirty-two years of coal mine employment, as well as her finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Belcher v. Pikeville Coal Co.*, BRB No. 11-0784 BLA, slip op. at 2 n.3 (Aug. 16, 2012)(unpub.).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 4, 7.

the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence and contains no reversible error. Claimant essentially requests a reweighing of the evidence, which is beyond the scope of the Board's review. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

On remand, the administrative law judge initially noted the Board's instruction that, in weighing the x-ray and CT scan evidence, she must be mindful that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that Section 718.202(a)(1)-(4) provides alternative methods of establishing pneumoconiosis. *Belcher*, slip op. at 7, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). However, subsequent to the Board's decision, the Sixth Circuit held, in *Dixie Fuel Co. v. Director, OWCP [Hensley]*, 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012), that all types of evidence must be weighed together before determining whether claimant suffers from pneumoconiosis.⁵ The administrative law judge, therefore, properly considered the evidence under each of the Section 718.202(a) subsections individually, and then weighed the relevant evidence in its entirety.

⁵ Subsequent to the Board's decision, the United States Court of Appeals for the Sixth Circuit issued *Dixie Fuel Co. v. Director, OWCP [Hensley]*, 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012), agreeing with the decisions of the United States Court of Appeals for the Third and Fourth Circuits in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and *Island Creek Coal Co. v. Compton*, 11 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), in holding that, although 20 C.F.R. §718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether claimant suffers from the disease. *Hensley*, 700 F.3d at 881, 25 BLR at 2-218. The court reasoned that, while each of the four alternatives listed at 20 C.F.R. §718.202(a) may be sufficient to support a diagnosis of pneumoconiosis, that does not mean that any of the four kinds of evidence automatically proves the existence of pneumoconiosis in the face of contrary evidence. Instead, "whether or not a particular piece or type of evidence actually *is* a sufficient basis for finding pneumoconiosis will depend on the evidence [as a whole] in each case." *Hensley*, 700 F.3d at 881, 25 BLR at 2-218, quoting *Compton*, 211 F.3d at 209, 22 BLR at 2-171.

In determining that claimant failed to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a), the administrative law judge considered the x-ray evidence, CT scan evidence and medical opinion evidence. Weighing the CT scan evidence, the administrative law judge considered the two interpretations of the CT scan dated April 16, 2006. Dr. Abramowitz, Board-certified in radiology and a B reader, interpreted the CT scan as showing hyperexpanded lungs with bilateral bullous and interstitial lung disease, as well as showing patchy mild atelectasis or infiltrates bilaterally. Employer's Exhibit 7. Dr. Alexander, also Board-certified in radiology and a B reader, interpreted the CT scan as showing a background of small reticulonodular densities which would be consistent with simple coal workers' pneumoconiosis of low to moderate profusion, with no evidence of complicated pneumoconiosis. However, Dr. Alexander stated that CT scans cannot be used to exclude or classify simple pneumoconiosis, for which x-rays must be used. Decision and Order on Remand at 10; Claimant's Exhibit 3. The administrative law judge found that both physicians rendered opinions consistent with a finding of pneumoconiosis and, therefore, she found that the CT scan evidence supports a finding of pneumoconiosis. 20 C.F.R. §718.107; Decision and Order on Remand at 11. Nevertheless, she further found that the CT scan evidence was not sufficient, on its own, to establish the existence of clinical pneumoconiosis, but must be weighed against the x-ray and medical opinion evidence pursuant to *Hensley*.⁶

Weighing the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge reasonably found that it was in equipoise, as the April 19, 2006 and May 20, 2006 x-ray films were each read as positive for pneumoconiosis by Dr. Alexander and as negative for pneumoconiosis by Dr. Abramowitz, both of whom are Board-certified radiologists and B readers. Decision and Order on Remand at 5; Claimant's Exhibits 1, 2; Employer's Exhibits 6, 7; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Fannin, Mohan, Dahhan and Jarboe, as well as treatment records, finding that this evidence was insufficient to establish the existence of clinical pneumoconiosis. Decision and Order on Remand at 11. The administrative law judge found that Dr. Mohan's opinion, that the miner had coal workers' pneumoconiosis, was not well-reasoned because the physician failed to adequately explain the basis for his

⁶ The administrative law judge noted that the record does not contain any autopsy or biopsy evidence. Decision and Order on Remand at 5.

diagnosis.⁷ See *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Remand at 11; Director’s Exhibits 13, 26. Similarly, the administrative law judge found that the opinion of Dr. Fannin, that the miner had Stage II coal workers’ pneumoconiosis, was not well-documented because it was based on evidence not in the record.⁸ See *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 11; Director’s Exhibit 14; Employer’s Exhibit 8. The administrative law judge then found that the opinions of Drs. Dahhan⁹ and Jarboe,¹⁰ specifically opining that the miner did not have clinical pneumoconiosis, did not aid claimant in establishing pneumoconiosis. Decision and Order on Remand at 12; Employer’s Exhibits 2, 3, 4, 5. The administrative law judge, therefore, reasonably found that the medical opinions are insufficient to establish the existence of clinical pneumoconiosis. See *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 11.

⁷ In a letter dated May 18, 2009, Dr. Mohan, who attended the miner during his terminal hospitalization in May 2006, stated that the miner suffered from acute pancreatitis and also had coal workers’ pneumoconiosis. Director’s Exhibit 13. In a treatment note dated May 22, 2006, Dr. Mohan stated, under “Past Medical History,” that the miner had “longstanding [chronic obstructive pulmonary disease] and coal-workers’ pneumoconiosis.” Director’s Exhibit 26.

⁸ Dr. Fannin, the miner’s treating physician, opined that the miner had Stage II coal workers’ pneumoconiosis, based on an x-ray reading from the miner’s state workers’ compensation claim. Director’s Exhibit 14; Employer’s Exhibit 8 at 11-12.

⁹ Based on his review of the medical evidence of record and the miner’s death certificate, Dr. Dahhan opined that he saw no radiological evidence of coal workers’ pneumoconiosis, based on a review of x-ray film and CT scan evidence. Employer’s Exhibits 2, 4. Dr. Dahhan further opined that the miner suffered septic shock with acute pancreatitis and intra-abdominal pathology. *Id.* He concluded that the miner’s death was due to pancreatitis and its complications, and that it was not related to the inhalation of coal mine dust. *Id.*

¹⁰ Dr. Jarboe reviewed the medical evidence of record, including the miner’s death certificate, and opined that there is insufficient medical evidence to diagnose either clinical or legal pneumoconiosis, as the objective evidence in the form of x-ray films and a CT scan showed no evidence of coal workers’ pneumoconiosis. Employer’s Exhibits 3, 5. Dr. Jarboe also opined that the miner’s death was due to pancreatitis, which resulted in sepsis and shock. *Id.*

The administrative law judge then weighed together all of the evidence pertinent to the existence of clinical pneumoconiosis, finding that, while the CT scan evidence was supportive of a finding of clinical pneumoconiosis,¹¹ it was outweighed by the x-ray evidence and medical opinion evidence, which did not establish the existence of pneumoconiosis. Decision and Order on Remand at 12. She, therefore, permissibly concluded that claimant had not established the existence of clinical pneumoconiosis pursuant to Section 718.202(a) by a preponderance of the evidence. *Hensley*, 700 F.3d at 881, 25 BLR at 2-218; Decision and Order on Remand at 12. As substantial evidence supports the administrative law judge's findings, we affirm her determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

As claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a survivor's claim under Part 718, a finding of entitlement to benefits is precluded in this case.

¹¹ We note that, although the administrative law judge found the CT scan evidence supportive of a finding of pneumoconiosis because the readers made findings consistent with pneumoconiosis, neither of the physicians who interpreted the CT scans affirmatively diagnosed pneumoconiosis based on this evidence. Decision and Order on Remand at 10-11; Claimant's Exhibit 3; Employer's Exhibit 7.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge