

BRB No. 99-1072 BLA

SYLVIA TARR)	
(Widow of EDWARD TARR))	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
CLINCHFIELD COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0823 and 98-BLA-0824) of Administrative Law Judge Lawrence P. Donnelly, awarding benefits on a 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). The instant claims involve a miner's claim filed on April 2, 1996, and a survivor's claim, filed on July 25, 1997. After crediting the miner with at least thirty-eight and eighty-eight hundredths years of coal mine

employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the miner's total disability and death were due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), 718.204(c), 718.205. Accordingly, benefits were awarded. On appeal, employer challenges the administrative law judge's findings at Section 718.202(a)(1), (a)(2) and (a)(4), Section 718.203(b), Section 718.204(b) and Section 718.205. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he agrees with employer that the administrative law judge erred in his findings at Section 718.202(a)(1) and (a)(2). Claimant has not responded to this appeal.¹

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §718.204(c)(1)-(4), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis.² See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *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). The United States Court of Appeals for the Fourth Circuit has held that any condition that hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c)(2). See *Shuff, supra*.

Employer first challenges the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1), asserting that the administrative law judge erred in ignoring the x-ray readings where the readers indicated there were no parenchymal or pleural abnormalities consistent with pneumoconiosis. In the instant case, the administrative law judge erred in not considering x-ray readings which did not use the ILO-U/C interpretation of 0/0 for a negative reading.³ See Decision and Order at 28, Director's Exhibits 42, 46, 57, 69, 70, 72. In addition, where the x-ray reader, using the standard form for an x-ray read for pneumoconiosis, has indicated either that the film is completely negative, that there are no parenchymal abnormalities, or that there are no pleural abnormalities, an administrative law judge must consider such readings as negative, and weigh them against the positive x-ray readings of record. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We, therefore, vacate the administrative law judge's findings at Section 718.202(a)(1) and remand

²Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³The ILO-U/C system is a system for classifying "the radiological appearances seen in all types of pneumoconiosis." *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis*, International Labour Office, p. v (Revised Ed. 1980); 20 C.F.R. §718.102(b).

this case for further consideration.

Employer next argues that the administrative law judge should not have considered Dr. Sargent's x-ray interpretation, classified as 3/2, as a positive reading. Specifically, employer contends that the administrative law judge erred by failing to consider Dr. Sargent's comment on his October 22, 1996 x-ray form which indicates "Picture is more in keeping with interstitial pneumonitis or asbestos exposure and not particularly consistent with the presence of coal workers' pneumoconiosis." Director's Exhibit 46. Employer argues that Dr. Sargent's comment must be considered under Section 718.202(a)(1) because it raises a question as to whether the doctor's reading of 3/2 is positive for pneumoconiosis as defined in the Act and the regulations.⁴ 30 U.S.C. §902(b); 20 C.F.R. §718.201. Employer further contends that postponing consideration of Dr. Sargent's explanation of his positive classification to Section 718.203(b) effectively precludes rebuttal of the presumption that claimant's pneumoconiosis arose, at least in part, from his coal mine employment. Contrary to employer's argument, the administrative law judge properly counted Dr. Sargent's x-ray interpretation as positive, as the additional comments are to be considered at Section 718.203(b). *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc*). In *Cranor*, the Board held that comments which address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at Section 718.202(a)(1), but must be considered at Section 718.203(b). Dr. Sargent's comment that the pneumoconiosis was not coal workers' pneumoconiosis does not undermine his diagnosis of pneumoconiosis, the relevant issue at Section 718.202(a)(1), but merely addresses the source of the diagnosed pneumoconiosis and should be considered at Section 718.203(b). *Id.*

Employer also argues that the administrative law judge erred in weighing the biopsy and autopsy evidence at Section 718.202(a)(2). We agree. The administrative law judge did not discuss the weight he accorded to each of the medical opinions which addressed the biopsy or autopsy evidence, before finding this evidence sufficient to support claimant's burden of proof. Inasmuch as the Administrative Procedure Act (APA), *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), requires the administrative law judge to fully discuss his rationale for crediting and relying on evidence, we vacate the administrative law judge's finding at Section 718.202(a)(2), and remand for the administrative law judge to provide a proper

⁴The Act defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). A disease "arising out of coal mine employment" is defined at 20 C.F.R. §718.201 as "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

rationale for his findings at Section 718.202(a)(2).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, held that in considering the existence of pneumoconiosis under 20 C.F.R. 718.202(a)(1)-(4), the administrative law judge must weigh all of the evidence of the existence of pneumoconiosis together to determine whether claimant has established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000). On remand, the administrative law judge is instructed to reconsider all the evidence at Section 718.202(a)(1)-(4), pursuant to *Compton*.

In addition, although the administrative law judge indicated that he found that the evidence "unanimously shows" that the miner's total disability and death were caused by his fibrosis, the administrative law judge did not make separate findings at Sections 718.204(b), and 718.205(c). *See* Decision and Order at 31. On remand, the administrative law judge must separately discuss his findings on disability causation and the miner's cause of death. *See* 20 C.F.R. §§ 718.204(b) and 718.205.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is vacated and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge