

BRB No. 06-0269 BLA

ETHEL M. BACKO)
(Widow of JOSEPH BACKO))
)
)
v.)
)
JEDDO HIGHLAND COAL COMPANY)
)
and)
)
LACKAWANNA CASUALTY COMPANY) DATE ISSUED: 09/26/2006
)
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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Ethel M. Backo, Mahanoy City, Pennsylvania, *pro se*.

Maureen E. Herron (Cipriani & Werner), Scranton, Pennsylvania, for
employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits (05-BLA-5767) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge credited claimant with twenty-six years of coal mine employment pursuant to the parties' stipulation.² Decision and Order at 2. Applying the regulations 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) or that pneumoconiosis caused or substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). *Id.* at 5-7. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has filed a response brief, urging affirmance of the administrative law judge's denial of benefits.³ The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.⁴

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by

¹Claimant filed her survivor's claim for benefits on August 23, 2004. Director's Exhibit 2. The miner's first claim for benefits, filed on June 29, 1973, was finally denied on August 13, 1979. The miner's second claim, filed on October 13, 1987, was finally denied on April 6, 1989. The miner's third claim, filed on June 29, 1992, was finally denied on September 28, 1992. The miner died on July 15, 2004. Director's Exhibit 7.

²At the hearing, employer agreed with claimant's allegation that the miner had twenty-six years of coal mine employment. Hearing Transcript at 5.

³Employer filed a Motion to Quash Claimant's Appeal dated May 19, 2006 based on claimant's failure to file a Petition for Review and brief. On July 25, 2006, the Board issued an Order denying Employer's Motion to Quash, stating that it earlier had issued a letter acknowledging claimant's appeal under the general standard of review in accordance with 20 C.F.R. §§802.211(e), 802.220.

⁴We affirm the administrative law judge's finding that the miner had twenty-six years of coal mine employment because this finding is not adverse to claimant and is unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

The x-ray evidence consists of one reading of each of five x-rays dated May 16, 1988, July 6, 1992, June 23, 1994, June 28, 2002, and July 6, 2004. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge stated that "[o]f the five chest X-ray interpretations in the record, only the film taken in June 1994 was found to be positive for pneumoconiosis (1/1), while the two later films were interpreted as negative by B-readers."⁵ Decision and Order at 5. Therefore, the administrative law judge found "that the weight of the X-ray evidence is negative for pneumoconiosis." *Id.* In fact, as the administrative law judge noted in his outline of the evidence in his decision, the two x-rays taken after Dr. Conrad's positive 1994 x-ray interpretation were read as negative by Drs. Mohan and Zeglen, whose qualifications are not in the record. See Director's Exhibit 9. Accordingly, the administrative law judge erred in mischaracterizing the evidence by stating that the two x-rays taken after the positive 1994 x-ray were read as negative by B readers. However, given that Dr. Conrad's qualifications are not in the record and the two earlier x-rays, taken on May 16, 1988 and July 6, 1992, were read as negative by physicians who are B readers and Board-certified radiologists, we hold that substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). See *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); see also *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

The administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because the record

⁵A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. See 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

does not contain any biopsy or autopsy evidence. Moreover, since there is no evidence of complicated pneumoconiosis and the instant case involves a survivor's claim filed on August 23, 2004, the administrative law judge properly determined that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305(e), 718.306. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2), (a)(3).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinion evidence. Regarding the evidence relevant to the existence of pneumoconiosis, the administrative law judge noted that the hospital records of July 2004, which were authored by Dr. Doherty, contain a diagnosis of coal workers' pneumoconiosis.⁶ Additionally, the administrative law judge considered the opinion of Dr. Ahluwalia, who examined the miner in 1992. The administrative law judge noted that Dr. Ahluwalia's "sole cardiopulmonary diagnosis was hypertension." Decision and Order at 6. The administrative law judge further stated that Dr. Dittman, who reviewed the medical evidence, found no evidence of coal workers' pneumoconiosis. *Id.* The administrative law judge found that "[a]lthough Dr. Doherty reported a diagnosis of pneumoconiosis, the basis for his opinion is unstated." Therefore, the administrative law judge accorded Dr. Doherty's diagnosis of pneumoconiosis "no weight" because he found that this physician "failed to explain the reasons for his diagnosis." Decision and Order at 6. The administrative law judge concluded that the medical opinion evidence failed to support a finding of the existence of pneumoconiosis because "no physician has credibly found the miner had pneumoconiosis." *Id.*

An administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met her burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge permissibly accorded "no weight" to Dr. Doherty's opinion, the only opinion in the record that supports a finding of pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at

⁶The administrative law judge also noted that Dr. Doherty signed the death certificate, which lists the cause of death as metastatic renal cell carcinoma. Director's Exhibit 7.

Section 718.202(a)(4).⁷ See *Maddaleni*, 14 BLR at 1-140; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809, 1-811 (1984).

Based on the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(a)(4). Because we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(a)(4), we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on all of the relevant evidence at Section 718.202(a), in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). As claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718 in this survivor's claim, we further affirm the administrative law judge's denial of benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Trumbo*, 17 BLR at 1-87-88.

⁷The administrative law judge also considered the CT scan evidence which consists of one interpretation of each of three CT scans performed on March 12, 2003, May 7, 2003, and June 7, 2004. None of the physicians who interpreted the CT scans noted findings consistent with the existence of pneumoconiosis. Therefore, the administrative law judge properly found that the CT scan evidence failed to establish the existence of pneumoconiosis. 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).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge