

BRB No. 93-2283 BLA

LEOTA BLEDSOE)
(Widow of DAVID F. BLEDSOE,)
JR.))

)
Claimant-Petitioner)

v.)

)
CANNELTON INDUSTRIES,)
INCORPORATED)

)
Employer-Respondent) DATE ISSUED:

)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Party-In-Interest) DECISION and ORDER

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

Leota Bledsoe, Miami, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for
employer.

Before: , Acting Chief Administrative Appeals Judge, and ,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the

Decision and Order (92-BLA-0645) of Administrative Law Judge George P. Morin

denying 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). Claimant, the miner's widow, appeals, without the assistance of counsel, the administrative law judge's Decision and Order denying benefits. This case involves a duplicate claim issue. The miner filed a claim for benefits on November 10, 1983, which was denied on September 26, 1984. The miner filed a second claim for benefits on June 7, 1986. The miner died on July 29, 1990 and claimant filed a survivor's claim on December 4, 1990. Upon considering both the miner's and the survivor's claims pursuant to Part 718, the administrative law judge determined that the miner established over thirty-three years of coal mine employment. The administrative law judge then determined that the miner's claim was a duplicate claim as the newly submitted evidence failed to establish a material change in condition pursuant to 20 C.F.R. §725.309. The administrative law judge then considered all of the medical evidence of record and concluded that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202 and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. The administrative law judge then found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied on both the miner's and the survivor's claims. Claimant appeals these denials. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation

Programs (the Director), has chosen not to respond to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Initially, it is noted that the administrative law judge erred in determining that the miner failed to establish a material change in conditions pursuant to Section 725.309, as the newly submitted evidence contains positive x-ray interpretations which, if fully credited, could change the prior administrative result. See Decision and Order at 10; Director's Exhibits 9, 10; 20 C.F.R. §718.202(a)(1); *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990). However, this error is harmless as the administrative law judge considered the merits of the miner's claim pursuant to 20 C.F.R. Part 718. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Upon considering the miner's claim pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered all of the x-ray evidence of record which consists of fourteen interpretations of four x-rays. See Director's Exhibits 9, 10, 23-25; Employer's Exhibit 3. Of these interpretations, only three are positive for the

existence of pneumoconiosis. See Director's Exhibits 9, 10, 23. The administrative law judge permissibly found that the preponderance of the x-ray evidence is negative for pneumoconiosis pursuant to Section 718.202(a)(1). See *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990). As a result, the administrative law judge's finding that the miner failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) is affirmed as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered the autopsy evidence which consists of the report of an autopsy performed by Dr. Hansbarger. See Director's Exhibit 38. In his report, Dr. Hansbarger states that he found no evidence of coal workers' pneumoconiosis. See Director's Exhibit 38. The administrative law judge permissibly found the autopsy report to be the most reliable indicator of the presence or absence of pneumoconiosis. See Decision and Order at 11; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Kinnick v. National Mines Corp.*, 2 BLR 1-221 (1979). The administrative law judge also found Dr. Hansbarger's position to be supported by the opinions of four reviewing pathologists, Drs. Rasmussen, Caffrey, Zaldivar, and Naeye, none of whom found evidence of pneumoconiosis. See Decision and Order at 11; Employer's Exhibits 2, 4-6. There is no biopsy evidence in the record. As a result, the administrative law judge's finding that the miner failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) is affirmed as it is supported by substantial evidence of record.

The existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(3) as there are no presumptions that apply in this case.¹

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered all of medical opinion evidence of record. This evidence includes a letter, dated March 12, 1984, from Dr. McWeeney of the Cabin Creek Health Association which states that the miner suffered from chronic obstructive pulmonary disease due to coal workers' pneumoconiosis. See Director's Exhibit 44. The record also contains two reports from Dr. Rasmussen, dated August 26, 1986 and February 14, 1990, which state that the miner has pneumoconiosis. See Director's Exhibits 7, 21. However, Dr. Rasmussen, in a record review dated January 22, 1992, stated that there is no evidence of coal workers' pneumoconiosis. See Employer's Exhibit 2. Dr. Zaldivar, in a report dated January 11, 1984, stated that the miner has

¹The presumption at 20 C.F.R. §718.304 is not applicable as there is no evidence that the deceased miner suffered from complicated pneumoconiosis. The fifteen year presumption contained in 20 C.F.R. §718.305 is inapplicable here as claimant's application for benefits was filed after January 1, 1982. 20 C.F.R. §718.305(e). The presumption at 20 C.F.R. §718.306 applies only to survivor's claims filed prior to June 30, 1982 wherein the miner died on or before March 1, 1978. 20 C.F.R. §718.306(a).

pneumoconiosis. See Director's Exhibit 23. However, in a record review and report of physical exam dated February 20, 1990 and a record review dated February 12, 1992, Dr. Zaldivar stated that the miner did not have any evidence of pneumoconiosis. See Director's Exhibit 23; Employer's Exhibit 5. Drs. Naeye and Caffrey performed record reviews in which they stated that the miner did not have pneumoconiosis. See Employer's Exhibits 4, 6. Dr. Aburahma, in a medical opinion dated June 19, 1985, did not diagnose pneumoconiosis. See Employer's Exhibit 1. Also, Dr. Hansbarger, in the autopsy report of July 29, 1990 and a record review dated February 13, 1991, found no evidence of pneumoconiosis. See Director's Exhibits 38, 51. Upon considering this evidence, the administrative law judge permissibly accorded the most weight to the opinion of the autopsy prosector and the opinions of the pathologists who reviewed the record subsequent to the autopsy. See Decision and Order at 11-12; Director's Exhibits 38, 51; Employer's Exhibits 2, 4-6; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Terlip, supra*; *Fetterman, supra*; *Kinnick, supra*. As a result, the administrative law judge's finding that the miner failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) is affirmed as it is supported by substantial evidence. Further, as neither the miner nor claimant has established the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, the administrative law judge's denial of benefits on both the miner's and the survivor's claims are affirmed. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge