

BRB No. 97-0309 BLA

STELLA WHITE)	
(Widow of CHARLIE WHITE))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Stella White, Hazard, Kentucky, *pro se*.

Cathryn Celeste Helm (J. Davitt McAteer, Acting 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ proceeding without the benefit of counsel, appeals the Decision and Order-Denying Benefits (95-BLA-1342) of Administrative Law Judge J. Michael O'Neill, on claims 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). This appeal involves both a miner's claim which previously has been before the Board, and a survivor's claim.²

¹Claimant is the surviving spouse of the miner, Charlie White, who died on August 20, 1987. Director's Exhibit 8.

²The relevant procedural history of this case is as follows: The miner filed his initial claims for Black Lung benefits with the Department of Labor on November 8, 1972, under

Part B of the regulations, and on November 24, 1975, under Part C of the regulations. Unmarked Exhibit. After both claims were denied, they were merged pursuant to the 1977 Amendments to the Act. *Id.* Following a formal hearing on May 7, 1987, in Buckhorn, Kentucky, before Administrative Law Judge Edward Terhune Miller, the miner's claim was denied by a Decision and Order dated June 21, 1988. Director's Exhibit 15. Prior to Judge Miller's denial, the miner died on August 10, 1987. Director's Exhibit 8. Claimant appealed the denial of the miner's claim to the Board. In a Decision and Order dated March 27, 1990, the Board affirmed Judge Miller's denial of the miner's claim under Part 727, but remanded the case to the administrative law judge for further consideration of the miner's claim under Part 718. See *White v. Director, OWCP*, BRB No. 88-2444 BLA (Mar. 27, 1990)(unpub.); Director's Exhibit 15. The Director's Motion for Reconsideration was denied. See BRB Order, dated December 5, 1991; Unmarked Exhibit. In the meantime, on July 12, 1988, claimant filed her initial claim for survivor's benefits. Director's Exhibit 15. This claim was initially denied by the district director on January 5, 1989, and again on March 3, 1989, *id.*, and forwarded to the Office of Administrative Law Judges (OALJ). *Id.* In an OALJ Order, dated December 19, 1989, the case was remanded to the district director for consolidation with the miner's claim pending the Board's disposition of the miner's claim. *Id.* Subsequent to the Board's decision on the miner's claim, the cases were

The administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis or total disability on the miner's claim, or death due to pneumoconiosis under 20 C.F.R. §718.205 on the survivor's claim. Accordingly, he denied both claims. Employer responds to claimant's appeal, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *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). Under 20 C.F.R. §718.205(c), death will be considered due

consolidated, and again the district director denied both claims on December 28, 1994. Director's Exhibit 13. In the meantime, claimant had filed a second survivor's claim on July 28, 1994. Unmarked Exhibit. On February 21, 1995, claimant requested a hearing before the OALJ. Director's Exhibit 14. On April 4, 1995, the claims were transferred to the OALJ. Director's Exhibit 16. Administrative Law Judge J. Michael O'Neill conducted a hearing on both claims in Hazard, Kentucky, on January 23, 1996. Decision and Order at 2; Hearing Transcript at 1. Judge O'Neill issued his decision denying both claims on September 20, 1996. Decision and Order at 1.

to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction of this case lies, held in *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), that pneumoconiosis will be found to be a substantially contributing cause or factor in the miner's death where it is found to have actually hastened death.

Upon consideration of the administrative law judge's Decision and Order, and the record before us, we conclude that substantial evidence supports the administrative law judge's denial of benefits on both the miner's claim and the survivor's claim. On the miner's claim, the administrative law judge properly found that the weight of the submitted evidence failed to establish the existence of pneumoconiosis. In weighing the x-ray evidence under 20 C.F.R. §718.202(a)(1), the administrative law judge properly relied on the overwhelming weight of the negative x-ray interpretations rendered by physicians who were dually qualified as B-readers and Board-certified radiologists. See *Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); see also *Director, OWCP v. Greenwich Collieries [Ondecko]*, 117 S.Ct. 2251, 18 BLR 2A-1 (1994); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 4. Consequently, the administrative law judge's weighing of the x-ray evidence, and his finding that the existence of pneumoconiosis was not established under Section 718.202(a)(1), are affirmed.

Next, the administrative law judge properly noted that the record does not contain autopsy evidence or biopsy evidence under Section 718.202(a)(2), and that the presumptions found under Section 718.202(a)(3) were inapplicable in this case. *Id.* Consequently, we affirm the administrative law judge's finding that pneumoconiosis could not be established under these subsections.

Next, under 20 C.F.R. §718.202(a)(4), we hold that substantial evidence supports the administrative law judges's finding that the physician opinion evidence failed to establish the existence of pneumoconiosis. Initially, the administrative law judge properly noted that the opinions of Drs. Williams, Smith and Dahhan did not diagnose pneumoconiosis, and therefore were not supportive under Section 718.202(a)(4). See *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 5. Moreover, the administrative law judge properly discredited Dr. Nash's opinion which diagnosed pneumoconiosis. The administrative law judge found that the x-ray read by Dr. Nash as positive, was re-read by Dr. Cole, an x-ray interpreter with superior qualifications, as negative, see *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983), and that the objective tests Dr. Nash relied upon had been invalidated by a reviewing physician who possesses qualifications as a pulmonary specialist. See *Baker v. North American Coal Co.*, 7 BLR 1-79 (1984); Decision and Order at 5. The administrative law judge's credibility determinations are reasonable, and may not, therefore, be disturbed by the Board. See *O'Keeffe, supra*; *Peabody Coal Co. v. Benefits Review Board [Wells]*,

560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).³ Accordingly, we affirm the administrative law judge's findings and hold that substantial evidence supports his determination that the evidence of record fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). We therefore affirm his denial of benefits on the miner's claim. See *Trent, supra*; *Perry, supra*.

Turning to the survivor's claim, we hold that substantial evidence supports the administrative law judge's finding that the relevant evidence establishes that pneumoconiosis did not hasten, or in any way cause, the miner's death. The administrative law judge properly noted that the record was devoid of any evidence, whatsoever, which could establish that the miner's death was due to pneumoconiosis. See *Brown, supra*; Decision and Order at 6; Director's Exhibit 8. Moreover, inasmuch as the administrative law judge found the record insufficient to establish the existence of pneumoconiosis under Section 718.202(a), an award of benefits on the survivor's claim is precluded. See *Trumbo, supra*. Consequently, we affirm the administrative law judge's findings under 20 C.F.R. §718.205(c), and his denial of benefits on the survivor's claim. See *Trumbo, supra*; *Neeley, supra*; see also *Brown, supra*.

³Given that substantial evidence supports the administrative law judge's finding that the weight of the evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), we hold that any error the administrative law judge may have made in discrediting Dr. Jones' opinion is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); cf. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 to 1-383, n.4 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge