BRB No. 97-1236 BLA

BETTY LOU OSKEY (Widow of LEO P. OSKEY) Claimant-Petitioner v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Betty Lou Oskey, Glouster, Ohio, *pro se*.

Thomas H. Odom and W. William Prochot (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (96-BLA-0332) of Administrative Law Judge Donald W. Mosser (the administrative law judge)

[1]Claimant is the widow of the deceased miner, Leo P. Oskey, who died on December 4, 1994. Director's Exhibits 9, 11. Claimant filed her survivor's claim on December 13, 1994. Director's Exhibit 9.

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). The administrative law judge, based on employer's stipulation, credited the miner with twenty-one years of coal mine employment and adjudicated the miner's duplicate claim[2] and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the newly submitted evidence

[2]The miner filed his first claim on December 24, 1981. Director's Exhibit 24. On June 9, 1982, the Department of Labor (DOL) informed the miner that his claim would be considered denied by reason of abandonment if he did not respond to its letter within thirty days. *Id*. Inasmuch as the miner did not pursue this claim any further, the denial became final. On October 3, 1983, the miner filed his second claim. Director's Exhibit 25. This claim was denied by the DOL on December 2, 1983, August 27, 1984, October 16, 1984 and November 2, 1984. *Id*. The bases of the denial were that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id*. Because the miner did not pursue this claim any further, the denial became final. On April 22, 1985, the miner filed his third claim, which was denied by the DOL on July 1, 1985 and December 13, 1985. Director's Exhibit 26. The denial became final because the miner did not pursue this claim any further. On July 6, 1988, the miner filed his fourth claim. Director's Exhibit 27. This claim was denied by the DOL on January 26, 1989 and July 30, 1992. *Id*. Inasmuch as the miner did not pursue this claim any further, the denial became final. The miner filed his fifth claim on August 7, 1992. Director's Exhibit 28. On December 31, 1992, the claim was denied by the DOL, and the miner, through his attorney, requested a hearing on February 17, 1993. *Id*. However, on February 17, 1993, the DOL informed the miner's attorney that it did not have a signed statement from the miner authorizing him to act on behalf of the miner. *Id*. On March 23, 1994, the miner's attorney sent the DOL a letter in response to a letter dated March 8, 1994 by the DOL which provided the necessary documentation authorizing him to represent the miner in this claim, and inquiring if this information would be sufficient to allow the miner's old claim to be reopened. *Id*. There is no indication from the record that the DOL responded to the March 23, 1994 inquiry of the miner's attorney. The miner filed his most recent claim on July 16, 1994. Director's Exhibit 1. The administrative law judge stated that "it appears as if [the miner's] fifth claim was never finally denied." Decision and Order at 11. Consequently, the administrative law judge "consolidated the evidence submitted with the miner's last two claims." *Id*. The administrative law judge also stated that the miner's "fifth and sixth claims, even if treated as one claim, still constitute a duplicate claim under the Act." *Id*.

insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge concluded that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. With regard to the survivor's claim, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge denied benefits in both claims. Claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we note that claimant appeared before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a

[3]Inasmuch as the administrative law judge's length of coal mine employment, which is not adverse to this *pro se* claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Transcript at 6-8, 11-27.

We next address the administrative law judge's consideration of the miner's duplicate claim pursuant to 20 C.F.R. Part 718. After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that "[t]he district director denied [the miner's prior] claims on the grounds that the evidence failed to prove any of the following conditions: pneumoconiosis; the disease was caused at least in part by coal mine work; and, that [the miner] was totally disabled by the disease." Decision and Order at 12; *see* Director's Exhibit 24-27. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).

We affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since each of the twenty-nine newly submitted x-ray interpretations of record is negative for pneumoconiosis.[4] Director's Exhibits 3, 12, 13, 28. Further, we affirm the administrative

[4]The administrative law judge properly considered the qualifications of the

law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 13. Additionally, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant miner's claim. *Id.* at 13-14; *see* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly,

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physicians who provided x-ray interpretations. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge observed that "the B-readers who interpreted the miner's x-rays, Dr. Sargent and Dr. Cole, reported no evidence of pneumoconiosis." Decision and Order at 13. The administrative law judge also observed that "Dr. Rente, who is also [B]oard-certified in radiology, interpreted a film [dated September 18, 1992] as 1/1, but stated that his interpretation was not necessarily positive for pneumoconiosis." *Id.*; Director's Exhibits 3, 28. The administrative law judge properly discredited Dr. Rente's interpretation because he found it to be equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

the presumption at 20 C.F.R. §718.306 is inapplicable because the miner died after March 1, 1978. *See* 20 C.F.R. §718.306(a); Director's Exhibits 9, 11.

Further, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical reports of Drs. Bontrager, Foglesong, Grodner and Long. Whereas Drs. Bontrager and Foglesong opined that the miner suffered from pneumoconiosis, Drs. Grodner and Long opined that the miner did not suffer from pneumoconiosis. The administrative law judge properly discounted the opinions of Drs. Bontrager and Foglesong because they are equivocal.[5] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Although the administrative law judge properly considered the newly submitted evidence at 20 C.F.R. §718.202(a)(1)-(4), and found this evidence insufficient to establish a material change in conditions at 20 C.F.R. §725.309, he did not consider whether the newly submitted evidence of record is sufficient to establish total disability at 20 C.F.R. §718.204(c),[6] an element of entitlement previously adjudicated against the miner. In accordance with *Ross*, the administrative law judge was required to determine whether

[5]The administrative law judge observed that "Dr. Fogelsang (sic) stated that he '**suspect[ed]** pneumoconiosis.'" Decision and Order at 14 (emphasis added). The administrative law judge also observed that "Dr. Bontrager '**assume[d]** that [the miner's] COPD was secondary to a type of pneumoconiosis.'" *Id.* (emphasis added).

[6]The record contains a newly submitted qualifying arterial blood gas study dated March 10, 1988. Director's Exhibit 12.

claimant has proven at least one of the elements of entitlement previously adjudicated against the miner. Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309, and remand the miner's claim for further consideration of all of the newly submitted relevant medical evidence of record regarding the issue of total disability. If the administrative law judge finds that claimant established a material change in conditions under 20 C.F.R. §725.309, he must then consider all of the evidence of record to determine whether it supports a finding of entitlement to benefits in the miner's claim on the merits under 20 C.F.R. Part 718.

Finally, inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[7] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). The administrative law judge stated that

[7]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

the "evidence does not support a finding that pneumoconiosis hastened the miner's death in any way." Decision and Order at 16. Dr. Grodner opined that pneumoconiosis did not contribute to the miner's death. Employer's Exhibit 1. Dr. Kudlapur opined that the cause of the miner's death was "[c]ardiopulmonary arrest, secondary to acute myocardial infarction and extensive sepsis, bilobar pneumonia on the right side and gangrene of the left leg, contributing from history of diabetes and Alzheimer's disease." Director's Exhibit 12. Further, the death certificate signed by Dr. Kudlapur lists respiratory and cardiac arrest as the immediate cause of the miner's death, and myocardial infarction, pneumonia, sepsis, and gangrene of the left leg as underlying causes of the miner's death. Director's Exhibit 11. Inasmuch as the record contains no evidence which could support claimant's burden at Section 718.205(c), we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), as supported by substantial evidence. *See Brown, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration of the miner's claim consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge