

BRB No. 99-1290 BLA

ADRIANA KOTCHO )  
(On Behalf of HERBERT W. KOTCHO))

Claimant-Petitioner )

v. )

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

Respondent )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-00558) of Administrative Law

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<sup>1</sup>Claimant is Adriana Kotcho, the widow of Herbert W. Kotcho, the miner. The miner initially filed a claim for benefits on November 18, 1980 which was denied by the district director on April 8, 1981. Director's Exhibit 13. The miner filed a second claim for benefits on August 1, 1983 which was ultimately denied on October 20, 1992 when the Board affirmed Administrative Law Judge Gerald M. Tierney's Decision and Order denying benefits. Director's Exhibit 13; *Kotcho v. Director, OWCP*, BRB No. 87-0384 BLA (Oct.

Judge Robert D. Kaplan denying benefits on a miner'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). This case involves a duplicate claim. The administrative law judge found that the parties stipulated that claimant established four and one-half years of qualifying coal mine employment, that the Director, Office of Workers' Compensation Programs (the Director), conceded the issues of total respiratory disability pursuant to 20 C.F.R. §718.204(c) and a material change in conditions pursuant to 20 C.F.R. §725.309, but that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to Section 718.202(a) and in failing to consider the evidence of record pursuant to 20 C.F.R. §§718.203 and 718.204(b). The Director responds, urging affirmance of the administrative law judge's denial of benefits.

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

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements by a preponderance of the evidence compels a denial of benefits. *See Anderson, supra; Baumgartner, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en*

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20, 1992)(unpub.). The miner filed the instant claim on September 4, 1998. Director's Exhibit 1. The miner died on April 15, 1999 and claimant is pursuing the claim on his behalf. Hearing Transcript at 7-8.

<sup>2</sup>We affirm the administrative law judge's findings regarding the length of claimant's coal mine employment, that claimant established total respiratory disability pursuant to Sections 718.204(c) and a material change in conditions pursuant to Section 725.309, as well as his findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

*banc*).

Initially, claimant contends that the administrative law judge erred in finding that Dr. Nat Levinson's opinion is insufficient to support a finding of the existence of pneumoconiosis because Dr. Nat Levinson relied upon the miner's work history, smoking history, treatment records and the reports of Drs. Lenahan and Langieri to conclude that the miner had pneumoconiosis. Claimant's Brief at 5-9. Dr. Nat Levinson opined that the miner suffered from an adenocarcinoma of the right lower lobe with pleural metastatic disease, in conjunction with severe chronic obstructive pulmonary disease with emphysema and bronchospasm and that the miner's previous coal mining employment contributed to his respiratory difficulties. Claimant's Exhibits 8, 9. The administrative law judge properly found that Dr. Levinson's opinion constitutes a diagnosis of pneumoconiosis. Decision and Order at 8. The administrative law judge further acted within his discretion in finding that Dr. Levinson's opinion is inadequately reasoned, and entitled to no weight, because he did not explain how he arrived at his conclusion that the miner's coal mine employment contributed to his respiratory difficulties and he did not explain how he weighed the miner's thirty-year smoking history along with his brief coal mine employment history. Decision and Order at 8; *Lafferty v. Cannerton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The only other physician of record to diagnose pneumoconiosis was Dr. Aquilina, who based his opinion on the miner's five year coal mine dust exposure history, his "minimal" smoking history and a positive x-ray interpretation. Director's Exhibit 13-36 at 11. Although claimant does not challenge the administrative law judge's weighing of Dr. Aquilina's opinion on appeal, we hold that the administrative law judge acted within his discretion in finding Dr. Aquilina's opinion to be not well-reasoned because Dr. Aquilina relied on a "minimal" smoking history when claimant testified that the miner smoked less than a pack per day for approximately thirty years. Decision and Order at 9; Director's Exhibit 13-36 at 11; Hearing Transcript at 20-21; *Lafferty, supra*; *Clark, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Inasmuch as the record contains no other medical opinion evidence which would support a finding of the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and the denial of benefits.

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

SO ORDERED.

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<sup>3</sup>The record also contains a report from Dr. Sanders Levinson, who did not diagnose pneumoconiosis. Decision and Order at 7; Director's Exhibit 6.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge