

BRB No. 08-0189 BLA

A. D. )  
(Widow of C. D.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
PEABODY COAL COMPANY )  
 )  
and )  
 ) DATE ISSUED: 09/29/2008  
PEABODY INVESTMENTS, )  
INCORPORATED )  
 )  
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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, P.S.C.), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (05-BLA-6227) of Administrative Law Judge Pamela Lakes Wood rendered 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 the miner with fifteen years of coal mine employment<sup>2</sup> based on the parties' stipulation. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence, in determining that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).<sup>3</sup> Employer responds, urging affirmance of the denial of benefits. Claimant has filed a reply brief, reiterating her contentions. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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

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<sup>1</sup> Claimant is the widow of the miner, who died on June 8, 2004. Director's Exhibit 10. Claimant filed her claim for survivor's benefits on July 19, 2004. Director's Exhibit 4. The district director awarded benefits on June 13, 2005, and employer requested a hearing before the Office of Administrative Law Judges on June 16, 2005. Director's Exhibit 18, 19.

<sup>2</sup> The record indicates that the miner's last coal mine employment occurred in Kentucky. Director's Exhibit 11. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

<sup>3</sup> Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge provided no basis for finding that the x-ray evidence of record did not establish the existence of pneumoconiosis. Claimant's Brief at 4. We disagree. The administrative law judge considered readings of eight x-rays. The administrative law judge accurately noted that one x-ray was read as positive for pneumoconiosis. Specifically, Dr. Stokes interpreted a January 25, 1988 x-ray as reflecting "[c]hanges consistent with minimal pneumoconiosis, category 1/1 . . . ." Director's Exhibit 12. However, the administrative law judge also considered that the next seven x-rays of record, taken between November 1996 and May 2004, made no mention of pneumoconiosis.<sup>4</sup> Director's Exhibit 12; Claimant's Exhibit 1. The administrative law judge reasonably took into account that "every x-ray interpretation of record performed after 1988 d[id] not diagnose the Miner with pneumoconiosis," and she permissibly concluded that the "x-ray evidence on the whole" did not establish the existence of pneumoconiosis. Decision and Order at 16; see *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988). We therefore affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

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<sup>4</sup> Dr. Galuten read the November 22, 1996 and February 26, 1997 x-rays as showing evidence of chronic obstructive pulmonary disease. Director's Exhibit 12; Claimant's Exhibit 1. Dr. Westmoreland read the December 31, 1997 and November 10, 1999 x-rays as showing chronic obstructive pulmonary disease. *Id.* Dr. Armstrong read the April 30, 2001 x-ray as showing no evidence of cardiopulmonary disease. Claimant's Exhibit 1. Dr. Bickett read the October 16, 2002 x-ray as showing evidence of chronic obstructive pulmonary disease. *Id.* Dr. Verhulst read the May 23, 2004 x-ray as consistent with chronic obstructive pulmonary disease. *Id.*

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in failing to accord proper weight to the opinion of Dr. Givens, the miner's treating physician. Claimant further contends that the administrative law judge erred in crediting the opinions of Drs. Caffrey and Repsher, that the miner did not have pneumoconiosis.<sup>5</sup>

Dr. Givens, the miner's treating physician, prepared a letter dated February 14, 2005, in which he diagnosed chronic obstructive pulmonary disease (COPD) that was "a result of breathing coal dust for 17 years." Director's Exhibit 11. When deposed, Dr. Givens testified that he was a general practitioner, and he stated that he diagnosed clinical pneumoconiosis based on "x-ray findings plus work history, plus the clinical presentation of the shortness of breath, the worsening as years go on." Claimant's Exhibit 1 at 3, 16. Dr. Givens testified further that he based his diagnosis of legal pneumoconiosis on the fact that the miner had "the work exposure and the COPD." Claimant's Exhibit 1 at 16. Dr. Givens also testified that he was aware of the miner's long cigarette smoking history, and aware that the type of COPD that he diagnosed the miner with "could be consistent with" COPD developed from long-term cigarette smoking. *Id.* at 26.

By contrast, Dr. Caffrey, who is Board-certified in Anatomical and Clinical Pathology, and Dr. Repsher, who is Board-certified in Internal Medicine and Pulmonary Disease, both reviewed the medical evidence of record and opined that the miner did not have clinical or legal pneumoconiosis, but did suffer from mild COPD due to smoking.<sup>6</sup> Employer's Exhibits 1, 2.

With respect to the existence of clinical pneumoconiosis, the administrative law judge permissibly discounted Dr. Givens's diagnosis of clinical pneumoconiosis to the extent it was based on an x-ray, because the administrative law judge had determined that the x-ray evidence as a whole did not support the existence of clinical pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Regarding the existence of legal pneumoconiosis, the administrative law judge found that although Dr. Givens's opinion was well-documented, Dr. Givens "d[id] not use the underlying documentation to effectively support his conclusion that the Miner's COPD

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<sup>5</sup> A finding of either clinical or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(1),(2). "Legal pneumoconiosis" includes any chronic disease or impairment of the lung and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

<sup>6</sup> The administrative law judge noted that Drs. Caffrey and Repsher had also referred to medical evidence that was not of record, and she redacted those portions of the doctors' reports. Decision and Order at 14.

arose out of coal mine employment.” Decision and Order at 18. In so finding, the administrative law judge acted within her discretion to consider the reasoning of Dr. Givens’s opinion. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Substantial evidence supports the administrative law judge’s permissible credibility determination, and the Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113.

Further, as the administrative law judge permissibly discredited the only opinion supportive of a finding of pneumoconiosis, error, if there was any, in her reliance on the contrary opinions of Drs. Caffrey and Repsher on the issue would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We therefore decline to address claimant’s remaining arguments regarding those opinions, and we affirm the administrative law judge’s finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, we affirm the administrative law judge’s finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as it is supported by substantial evidence.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor’s claim pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge