BRB No. 12-0598 BLA

REKA JOE BURCHETT (Widow of KENIS S. BURCHETT)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 08/14/2013
COAL PREPARATION, INCORPORATED	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
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 of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (2009-BLA-5704) of Administrative Law Judge Peter B. Silvain, Jr., denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on November 4, 2008.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this survivor's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.[2] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

The administrative law judge initially credited the miner with 14.25 years of qualifying coal mine employment.[3] Consequently, the administrative law judge found that claimant could not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

---

[1] Claimant is the surviving spouse of the miner, who died on September 16, 2008. Director's Exhibit 9. The miner filed a claim for federal black lung benefits on October 3, 2005. Administrative Law Judge Stephen L. Purcell denied benefits, finding that the miner did not establish the existence of pneumoconiosis. The Board affirmed the denial of benefits. *K.S.B.* [*Burchett*] *v. Coal Prep., Inc.*, BRB No. 08-0860 BLA (July 29, 2009) (unpub.).

[2] The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). However, because the miner was not determined to be eligible to receive benefits at the time of his death, claimant is not eligible to receive benefits under amended Section 932(*l*).

[3] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Therefore, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis. Claimant also challenges the administrative law judge's evidentiary rulings. Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject claimant's contention that the administrative law judge erred in his resolution of the evidentiary issues in this case.[4]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, 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 pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

The Existence of Pneumoconiosis

Section 718.202(a)(1)

Claimant generally contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge considered five interpretations of three x-rays taken on October 15, 2003, November 12, 2005, and September 19, 2007. The administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 27-28.

While Dr. Westerfield, a B reader, interpreted the October 15, 2003 and September 19, 2007 x-rays as positive for pneumoconiosis, Claimant's Exhibit 1, Dr.

[4] Because claimant does not challenge the administrative law judge's finding that the miner worked for 14.25 years in coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we also affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption.

Meyer, a B reader and Board-certified radiologist, interpreted these same x-rays as negative for pneumoconiosis. Employer's Exhibits 6, 7. The administrative law judge acted within his discretion in crediting Dr. Meyer's negative interpretations of the October 15, 2003 and September 19, 2007 x-rays, over Dr. Westerfield's positive interpretations, based upon Dr. Meyer's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Sheckler*, 7 BLR at 1-131; Decision and Order at 28. The administrative law judge, therefore, permissibly found that the October 15, 2003 and September 19, 2007 x-rays were negative for pneumoconiosis. Decision and Order at 28. Because the November 12, 2005 x-ray was only interpreted as negative for pneumoconiosis,[5] the administrative law judge properly found that this x-ray did not support a finding of pneumoconiosis. *Id.* Because it is supported by substantial evidence, we 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).

Claimant, however, contends that the administrative law judge erred in excluding, as exceeding the evidentiary limitations, Dr. Broudy's positive interpretation of a November 10, 2005 x-ray. This x-ray interpretation was generated as part of Dr. Broudy's Department of Labor (DOL)-sponsored medical evaluation in the miner's claim. The medical evidence from the prior living miner's claim must be designated by one of the parties in order for it to be included in the record relevant to the survivor's claim. *See* 20 C.F.R. §§725.414, 725.456(b)(1); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2006) (en banc). In this case, claimant and employer each designated Dr. Broudy's positive x-ray interpretation as "DOL-sponsored" x-ray evidence. However, as the Director accurately notes, there are no DOL-sponsored evaluations in a survivor's claim. *See* 20 C.F.R. §725.406; Director's Brief at 2. Consequently, claimant failed to properly designate Dr. Broudy's x-ray interpretation as admissible evidence in this case.[6]

Claimant designated Dr. Westerfield's positive interpretation of a September 19, 2007 x-ray, and Dr. Alexander's positive interpretation of a July 25, 2008 x-ray, as her two affirmative x-ray interpretations. However, because Dr. Alexander interpreted a digital x-ray, the administrative law judge properly considered Dr. Alexander's x-ray interpretation as "other evidence," pursuant to 20 C.F.R. §718.107. *See Webber v.*

[5] Dr. Wiot, a B reader and Board-certified radiologist, interpreted the November 12, 2005 x-ray as negative for pneumoconiosis.

[6] Contrary to claimant's argument, the fact that neither she nor employer objected to the admission of Dr. Broudy's x-ray interpretation is irrelevant. The evidentiary limitations are mandatory and cannot be waived by the parties. *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004).

Peabody Coal Co., 23 BLR 1-123, 1-133 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order at 9. In light of this determination, claimant argues the administrative law judge should have admitted Dr. Broudy's positive interpretation of the November 10, 2005 x-ray as one of her two affirmative x-ray interpretations. However, even if this x-ray interpretation was admitted as one of claimant's two affirmative x-ray interpretations, employer submitted Dr. Wiot's negative interpretation of the November 10, 2005 x-ray as its rebuttal evidence. While Dr. Broudy is a B reader, Dr. Wiot is a B Reader and Board-certified radiologist. In light of the administrative law judge's decision to accord greater weight to the dually qualified physicians, Dr. Wiot's negative interpretation would be entitled to greater weight than Dr. Broudy's positive interpretation. Consequently, the administrative law judge's error, if any, in not admitting Dr. Broudy's x-ray interpretation into the record was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Section 718.202(a)(4)

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In addressing the issue of clinical pneumoconiosis, the administrative law judge considered the medical reports of Drs. Westerfield, Sikder, Bailey, Milstone, Rosenberg, and Jarboe. While Drs. Westerfield, Sikder, Bailey, and Milstone diagnosed clinical pneumoconiosis, Drs. Rosenberg and Jarboe opined that the miner did not suffer from the disease. Director's Exhibits 13-17; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4, 5, 8. In weighing the conflicting evidence, the administrative law judge found that the opinions of Drs. Westerfield, Sikder, Bailey, and Milstone were not well-reasoned.

[7] Because claimant does not challenge the administrative law judge's findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), these findings are affirmed. *Skrack*, 6 BLR at 1-711.

[8] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Decision and Order at 30-32. In contrast, the administrative law judge assigned greater weight to the opinions of Drs. Rosenberg and Jarboe, finding that these physicians "reviewed extensive medical records of the [m]iner over time and opined that the radiographic and CT scan findings were inconsistent with that of clinical pneumoconiosis." *Id.* at 32. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of clinical pneumoconiosis.

Claimant argues that the administrative law judge should have accorded greater weight to the opinions of Drs. Sikder, Bailey, and Milstone, based upon their status as the miner's treating physicians. An administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, the opinions of treating physicians get the deference they deserve based on their power to persuade. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). Because Drs. Sikder, Bailey, and Milstone did not provide an adequate explanation for diagnosing clinical pneumoconiosis, the administrative law judge permissibly found that their diagnoses were not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 30-32. Consequently, we reject claimant's contention that the administrative law judge was required to accord the opinions of Drs. Sikder, Bailey, and Milstone greater weight, based upon their status as the miner's treating physicians.

Claimant also argues that the administrative law judge erred in his consideration of Dr. Westerfield's opinion. We disagree. The administrative law judge permissibly found that the October 15, 2003 and September 19, 2007 x-rays that Dr. Westerfield interpreted as positive for pneumoconiosis were interpreted by Dr. Meyer, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of Dr. Westerfield's diagnosis of clinical pneumoconiosis. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 30-31; Claimant's Exhibit 1; Employer's Exhibits 6, 7. Because claimant does not assert any other error in regard to the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed.

In addressing the issue of legal pneumoconiosis, the administrative law judge considered the medical reports of Drs. Sikder, Milstone, and Jarboe. Dr. Sikder diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to cigarette smoking and coal mine dust exposure. Director's Exhibit 17. Dr. Milstone diagnosed pulmonary fibrosis that was "likely due to [the miner's] extensive exposure to coal dust." Director's Exhibit 13. In contrast, Dr. Jarboe opined that the miner did not suffer from any lung disease attributable to his coal mine dust

exposure. Employer's Exhibit 4 at 7-8.

The administrative law judge found that Dr. Sikder's conclusory opinion was not well-reasoned, finding that the doctor failed to explain the basis for her diagnosis of COPD, and how she attributed the disease to the miner's coal mine dust exposure. Decision and Order at 32. The administrative law judge further found that Dr. Milstone's diagnosis was unpersuasive, noting that the doctor did not initially attribute the miner's lung disease to coal dust exposure, but apparently did so only after the miner began the process of obtaining black lung benefits. *Id.* at 34. Finally, the administrative law judge found that Dr. Jarboe's opinion, that the miner did not suffer from legal pneumoconiosis, was not persuasive, noting that the doctor did not adequately explain his basis for excluding coal mine dust exposure as a contributor to the miner's lung disease. *Id.* at 33-34. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis.

Claimant's statements do not raise any substantive issue or identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[9]

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's denial of benefits. *Trumbo*, 17 BLR at 1-88.

[9] The administrative law judge found that the digital x-ray evidence was inconclusive as to the existence of pneumoconiosis. Decision and Order at 29. Because no party challenges this finding, it is affirmed. *Skrack*, 6 BLR at 1-711. The administrative law judge also found that the CT scan evidence did not establish the existence of pneumoconiosis. Decision and Order at 29. Although claimant alleges that the administrative law judge "failed to properly consider and evaluate" the CT scan evidence, claimant does not allege any specific error in regard to the administrative law judge's weighing of this evidence. We, therefore, affirm the administrative law judge's finding that the CT scan evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.107; *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); Decision and Order at 29.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge