

BRB No. 14-0025 BLA

JACQUELINE CARTWRIGHT	)	
(Widow of ARTHUR CARTWRIGHT)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CEDAR COAL COMPANY,	)	DATE ISSUED: 08/27/2014
INCORPORATED c/o GENERAL	)	
RECOVERY, 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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Robert M. Williams (Maroney, Williams, Weaver & Pancake, PLLC), Charleston, West Virginia, for claimant.

Mark J. Grigoraci (Robinson & McElwee, PLLC), Charleston, West Virginia, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2011-BLA-06248) of Administrative Law Judge Alan L. Bergstrom, rendered on a miner’s claim and a

survivor's claim,<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). Based on the administrative law judge's determination that the miner worked less than fifteen years in coal mine employment, he found that claimant was unable to invoke the rebuttable presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>2</sup> Relevant to the miner's claim, the administrative law judge accepted the parties' stipulation that the miner was totally disabled and, therefore, found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge weighed all of the record evidence together and concluded that it was insufficient to establish that the miner suffered from pneumoconiosis. Accordingly, the administrative law judge denied benefits in the miner's claim and the survivor's claim.

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<sup>1</sup> The miner filed an initial claim for benefits on January 13, 2003, which was denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner filed a subsequent claim on June 14, 2006. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on January 16, 2007. Director's Exhibit 18. Pursuant to the miner's request, the claim was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing. Director's Exhibit 19. On June 13, 2010, the miner died and claimant, the miner's widow, filed a survivor's claim on November 19, 2010. Director's Exhibits 45, 40. On February 25, 2011, the miner's claim was remanded to the district director for consolidation with the survivor's claim. Director's Exhibit 38. The district director issued a Proposed Decision and Order awarding benefits in the survivor's claim on June 30, 2011. Director's Exhibit 60. Employer requested a hearing, and the case was sent to the OALJ. Director's Exhibit 61. A telephonic hearing was held in both claims on January 15, 2013. Thereafter, the administrative law judge issued his Decision and Order – Denying Benefits in both the miner's and survivor's claims on September 23, 2013. The denial of benefits in the survivor's claim is the subject of this appeal, as claimant raises no allegation of error with respect to the denial of benefits in the miner's claim. *See* Claimant's Petition for Review.

<sup>2</sup> Amended Section 411(c)(4) provides for a rebuttable presumption that the miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis, if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those of an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

Claimant appeals, arguing that the administrative law judge erred in denying her survivor's claim.<sup>3</sup> Employer responds, urging affirmance of the denial of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

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.<sup>4</sup> 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 in her survivor's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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(b);<sup>5</sup> *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Collins v. Pond Creek Mining Co.*, 751 F.3d 180 (4th Cir.

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's denial of benefits in the miner's claim. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because the miner's claim was denied, claimant is not eligible for automatic benefits pursuant to amended Section 932(l). See 30 U.S.C. §932(l). Additionally, with regard to the survivor's claim, we affirm, as unchallenged, the administrative law judge's finding that because the miner worked less than fifteen years in coal mine employment, claimant is unable to invoke the presumption at amended Section 411(c)(4) that the miner's death was due to pneumoconiosis. See *Skrack*, 6 BLR at 1-711.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5.

<sup>5</sup> After the administrative law judge issued his decision, the Department of Labor revised 20 C.F.R. §718.205, effective October 25, 2013. The provisions at 20 C.F.R. §718.205(c) that were applied by the administrative law judge are now set forth at 20 C.F.R. §718.205(b).

2014); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In this case, the administrative law judge determined that claimant failed to prove that the miner suffered from pneumoconiosis and, thus, she was unable to establish that the miner's death was due to pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that "the weight of the x-ray evidence does not establish coal workers' pneumoconiosis, but supports a finding of interstitial pulmonary fibrosis." Decision and Order at 19. We affirm the administrative law judge's finding as it is not challenged by claimant on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered the miner's autopsy report. Director's Exhibit 47. Dr. Woodward performed the miner's autopsy on June 14, 2010. *Id.* On gross examination, Dr. Woodward described "severe anthracotic staining," but "no palpable consolidation or tumor," and "no areas of massive fibrosis." Director's Exhibit 47. Under microscopic description, he stated:

The pulmonary parenchyma demonstrates areas of anthracotic staining which is accentuated in subpleural locations. Medusa-head fibrotic nodules are identified. Emphysematous dilation of airways are present. Patchy fibrosis is observed. Bronchial metaplasia extends into lung tissue and acute bronchopneumonia is detected. Pulmonary arterial thickening is present.

*Id.* The final anatomic diagnosis was edema and congestion of the right and left lungs, acute bronchopneumonia and pneumoconiosis of both lungs. *Id.*

The administrative law judge also found that Dr. Caffrey reviewed the miner's autopsy slides and prepared a report dated February 9, 2011. Employer's Exhibit 6. Dr. Caffrey diagnosed interstitial lung disease consistent with idiopathic pulmonary fibrosis, acute bronchopneumonia in the left lung, acute passive congestion with petechial hemorrhages of both lungs, and moderate anthracotic pigment in both lungs. *Id.* Dr. Caffrey reported that there were no areas of complicated pneumoconiosis. *Id.* He explained that in order to diagnose pneumoconiosis the anthracotic pigment must stimulate the production of reticulin or collagen. *Id.* Although Dr. Caffrey noted he observed areas of anthracotic pigment, he stated they were not "associated with reticulin deposition and/or collagen." Dr. Caffrey concluded that he was unable to diagnose pneumoconiosis. *Id.*

In weighing the autopsy evidence, the administrative law judge concluded that, in light of “Dr. Woodward’s failure to attribute any fibrosis to the anthracotic pigment and Dr. Caffrey’s opinion that there was no reaction to the anthracotic pigment, the autopsy evidence is [in] equipoised [sic] at best and does not establish the presence of pneumoconiosis.” Decision and Order at 20. Thus, the administrative law judge found that claimant did not satisfy her burden of proof under 20 C.F.R. §718.202(a)(2).

Relevant to 20 C.F.R. §718.202(a)(3), the administrative law judge found that none of the presumptions at 20 C.F.R. §§718.304, 718.305 or 718.306 was available to assist claimant in establishing that the miner had pneumoconiosis. Decision and Order at 20. Finally, with respect to the medical opinion evidence, the administrative law judge found that, while Drs. Park, Eziri and Walker were of the opinion that the miner had pneumoconiosis, they “each failed to adequately discuss the rationale supporting his or her opinion.” *Id.* at 21; *see* Director’s Exhibits 1, 12, 46, 49. In contrast, the administrative law judge determined that Dr. Zaldivar provided a reasoned and documented opinion that the miner did not have pneumoconiosis. Decision and Order at 21; Employer’s Exhibit 13. Thus, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Claimant asserts that the administrative law judge erred in giving little weight to the autopsy report and the miner’s death certificate. Contrary to claimant’s assertion, however, the administrative law judge observed correctly that “[c]linical pneumoconiosis’ consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and *the fibrotic reaction of the lung tissue to that deposition* caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1) (emphasis added). In addition, the regulation at 20 C.F.R. §718.202(a)(2) states, in pertinent part, that “[a] finding in an autopsy or biopsy of anthracotic pigmentation . . . shall not be sufficient, by itself, to establish the existence of pneumoconiosis.” 20 C.F.R. §718.202(a)(2). Based on the regulatory definition of clinical pneumoconiosis, the administrative law judge rationally concluded that Dr. Woodward’s autopsy report was insufficient to satisfy claimant’s burden to establish the existence of clinical pneumoconiosis, as Dr. Woodward did not specify that the miner had a fibrotic reaction to the anthracotic staining he identified in the miner’s lungs. *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 19-20. The administrative law judge also rationally found that the death certificate did not aid claimant in proving that the miner had legal pneumoconiosis since it does not identify the cause of the miner’s pulmonary fibrosis. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Claimant argues that Dr. Caffrey's opinion should be discounted because he is "employer's hired gun" and "does not have the qualifications to render an opinion in this case." Claimant's Brief at [2-3] (unpaginated). However, in the absence of specific evidence of bias, party affiliation, alone, is not a dispositive factor in determining the weight to be assigned to the medical evidence of record. See *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc) (holding that it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable). The administrative law judge specifically addressed claimant's assertion that Dr. Caffrey was biased, and rejected it as being without merit. Because determinations regarding the weight to accord a physician's opinion are within the sound discretion of the administrative law judge, we reject claimant's allegation of error. See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Moreover, we reject claimant's assertion that Dr. Caffrey is not qualified to render an opinion in this case, as the administrative law judge permissibly determined that Dr. Caffrey's opinion was credible, based on Dr. Caffrey's status as a Board-certified anatomical and clinical pathologist. See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 20. We therefore affirm the administrative law judge's finding that the autopsy evidence is in equipoise and that claimant did not satisfy her burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2).

Finally, although claimant states on appeal that the "[t]he record in this case amply demonstrates that [the miner] suffered from complicated pneumoconiosis and died as a result of that disease," she does not explain her argument or identify specific evidence in the record to support her contention.<sup>6</sup> See *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); Claimant's Brief at [3]. Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. See *Sarf*, 10 BLR 1-119; *Fish*, 6 BLR 1-107. Additionally, because claimant raises no error with regard to the weight accorded the medical opinion evidence, we affirm the administrative law judge's finding that claimant did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). See *Sarf*, 10 BLR at 1-120-21.

We consider claimant's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. See *Anderson*, 12 BLR at

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<sup>6</sup> The administrative law judge found that "the medical evidence does not show large opacities or massive lesions in the [m]iner's lungs" to establish that the miner had complicated pneumoconiosis. Decision and Order at 20.

1-113. Therefore, we affirm the administrative law judge's finding that claimant failed to prove that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in her survivor's claim, benefits are precluded. *Id.* at 1-112.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge