BRB No. 01-0913 BLA

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| MAXINE B. NOGOSKY<br>(Widow of FRANK C. NOGOSKY) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| U.S. STEEL MINING COMPANY | ) | DATE ISSUED: |
| Employer-Respondent | ) | |
| 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 David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Maxine B. Nogosky, Orlando, Florida, *pro se*.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order -

[1] Claimant, Maxine B. Nogosky, is the widow of Frank C. Nogosky, the miner, who died on September 11, 1996. Director's Exhibits 5, 27. The miner filed his first application for benefits on October 27, 1970 with the Social Security Administration (SSA), which was denied in a Decision and Order rendered by SSA Administrative Law Judge Herman Platt on May 14, 1975. Director's Exhibit 17. Claimant elected to have the claim reviewed by the Department of Labor, which likewise denied the claim on August 12, 1981. *Ibid*. The miner took no further action on this claim, and subsequently, filed a duplicate application for benefits on September 20, 1993, which was denied on March 10, 1994. Director's Exhibit 18. Thereafter, the miner filed a request for modification on May 8, 1995. However, as it

Denying Benefits (00-BLA-0591) of Administrative Law Judge David W. Di Nardi 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).[2] Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, the miner's death was not due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.[3]

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating that he is not participating in this appeal.

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was filed more than one year after the previous denial, the district director denied it as untimely on May 10, 1995. *Ibid*. Claimant, the miner's widow, filed her survivor's claim for benefits on November 8, 1996. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Regarding claimant's appearance at the formal hearing before the administrative law judge without representation, a review of the record and hearing transcript reveals that claimant was afforded a full and fair hearing in accordance with 20 C.F.R. §725.362(b) inasmuch as the administrative law judge fully complied with the procedural safeguards delineated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *see* Hearing Transcript at 5-6.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 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 establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *accord Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence, contains no reversible error, and therefore, it is affirmed. Relevant to Section 718.202(a)(1), the x-ray evidence of record consists of thirty interpretations of twenty chest x-ray films. The administrative law judge correctly found that there were only two positive x-ray readings of record of films dated November 12, 1971 and June 8, 1981. The November 1971 film was read as positive for the existence of pneumoconiosis by Dr. Weisman, a Board-certified radiologist, and read as negative for the existence of pneumoconiosis by Drs. Rosenstein, Dennis, and Kuntz, Board-certified radiologists and B-readers, and by Dr. Furnary, a B-reader. Director's Exhibits 17, 27. The June 1981 film was read as positive for the existence of pneumoconiosis by Dr. Covelli, who is neither a Board-certified radiologist nor a B-reader, and interpreted as negative for the existence of pneumoconiosis by Dr. Sargent, a Board-certified radiologist and B-reader. *Ibid*. The administrative law judge, within a proper exercise of his discretion, accorded less weight to the two positive x-ray

readings of Drs. Weisman and Covelli because both films were reread as negative for the existence of pneumoconiosis by physicians with superior radiological expertise. *See* 20 C.F.R. §718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 4. Consequently, the administrative law judge accorded probative weight to the negative readings by the radiologists with demonstrated radiological expertise, and therefore, permissibly concluded that the existence of pneumoconiosis was not established under Section 718.202(a)(1). *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Because the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we affirm the administrative law judge's Section 718.202(a)(1) determination. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 4.[4]

[4] Error, if any, in the administrative law judge's determination that there were twenty-five interpretations of eighteen x-ray films rather than thirty interpretations of twenty films is harmless as it would not change the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 4; Director's Exhibits 17, 18, 24, 27.

Relevant to Section 718.202(a)(2), a review of the record reveals the opinions of Drs. Guarda and Perper regarding the autopsy evidence of record.[5] Dr. Guarda, the autopsy prosector, listed mild pulmonary anthracosis and mild anthracosis of the mediastinal lymph nodes among ten final anatomic diagnoses in his report dated September 13, 1996. Director's Exhibits 6, 27. In a supplemental report dated January 29, 1999, Dr. Guarda clarified his September 1996 report and explained that his designation of anthracosis, contained in the list of autopsy findings, was used to denote "anthracotic pigmentation" and that, in his opinion, there was an absence of pneumoconiosis in the miner. Director's Exhibits 26, 27. After reviewing the autopsy, Dr. Perper opined on May 9, 1997 that, although the miner had minor and non-significant markers of exposure to silica containing coal, the gross and microscopic findings of the lungs failed to reveal any significant degree of coal workers' pneumoconiosis. Director's Exhibits 15, 27. In a report dated November 29, 1999, Dr. Perper reviewed additional medical records and reports and, concluded that the miner had pulmonary findings of insignificant anthracotic pigmentation associated with markers of exposure to mixed coal dust but no evidence of coal workers pneumoconiosis, anthracotic lung disease, or any other occupational disease related to coal dust exposure. Director's Exhibit 27. The administrative law judge thoroughly reviewed the autopsy evidence, and within a rational exercise of his discretion, found that it failed to establish that the miner suffered from pneumoconiosis. Specifically, the administrative law judge rationally found that Dr. Guarda's clarification that his diagnosis of anthracosis was the equivalent of "anthracotic pigmentation," and as such, was insufficient, by itself, to establish the presence of pneumoconiosis. 20 C.F.R. §718.202(a)(2); *see Hapney v. Peabody Coal Co.*, 22 BLR 1-106 (2001)(*en banc*)(Smith and Dolder, Administrative Appeals Judges, dissenting in part and concurring in part); *Dagnan v. Blue Diamond Coal Mining Co.*, 994 F.2d 1536, 1541, 18 BLR 2-203, 2-209 (11th Cir. 1993); *see also Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Dobrosky v. Director, OWCP*, 4 BLR 1-680 (1984)(Kalaris, Administrative Appeals Judge, concurring and dissenting). Decision and Order at 21. The administrative law judge properly determined that Dr. Perper's opinion, that the miner's lungs contained centrilobular chronic emphysema which may have contributed to his demise, was similarly insufficient to establish the existence of pneumoconiosis inasmuch as Dr. Perper attributed the etiology of the emphysema to the miner's heavy cigarette and pipe smoking history. *See* 20 C.F.R. §718.201; *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 661 (4th Cir. 1999); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *see also Cornett v. Benham Coal, Inc.*,

[5] We affirm the administrative law judge's determination that the biopsy evidence consisted of bone marrow biopsies taken in connection with the treatment of the miner's macroglobulinemia, and as such, these records are insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 20-21; Director's Exhibit 27.

227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Consequently, the administrative law judge reasonably accorded determinative weight to the opinion of Dr. Perper as Dr. Perper provided a detailed discussion supporting his opinion that the miner did not suffer from coal workers' pneumoconiosis prior to his death that was based on his review of the autopsy protocol and additional medical records. *See Trumbo, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 22. Therefore, the administrative law judge properly credited the opinions of Drs. Guarda and Perper, physicians who possess equivalent pathological expertise and agreed that the autopsy evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order at 22.

We, likewise, affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3) as this determination is rational and contains no reversible error. Specifically, the administrative law judge correctly found that the presumption at Section 718.304 was inapplicable because the record is devoid of evidence establishing the presence of complicated pneumoconiosis, the presumption at Section 718.305 was inapplicable because this is a survivor's claim filed after January 1, 1982, and the presumption at Section 718.306 was inapplicable as the miner died after March 1, 1978 and this claim was filed after June 30, 1982. Accordingly, the administrative law judge properly determined that none of the presumptions referenced in Section 718.202(a)(3) was applicable to the instant claim, therefore, the administrative law judge's finding pursuant to Section 718.202(a)(3) is affirmed. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Relevant to Section 718.202(a)(4), the record contains the opinions of six physicians who rendered opinions with respect to the existence of pneumoconiosis.[6] In a report dated May 18, 1973, Dr. Roll opined that the miner's chest x-ray suggested emphysema with the possibility of some fine interstitial fibrosis that "possibly could be" a result of pneumoconiosis, but "is not characteristic of it." Director's Exhibits 17, 27. Dr. Goldman examined the miner on March 14, 1980 and diagnosed simple chronic bronchitis related to past cigarette abuse and "possibl[y] ... made worse by coal mining... ." Director's Exhibits 17, 27. On June 8, 1981, Dr. Covelli diagnosed chronic bronchitis related to coal dust exposure. *Ibid.* Dr. Akula diagnosed shortness of breath and wheezing secondary to congestive heart failure, but he could not rule out underlying obstructive lung disease based on the miner's sixty-pack-year smoking history. Director's Exhibit 27. Drs. Guarda and Perper opined that the miner did not suffer from coal workers' pneumoconiosis or any other occupational lung disease related to coal dust exposure. Director's Exhibits 6, 12, 15, 26, 27. The administrative law judge permissibly determined that the opinion of Dr. Roll, whose designated specialty is pulmonary disease although he is not a Board-certified pulmonologist, was worthy of little weight because Dr. Roll failed to affirmatively opine whether the miner had pneumoconiosis and to explain the cause of the miner's moderately reduced lung function, and hence, the administrative law judge found that this opinion was equivocal. *See Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 24. Likewise, the administrative law judge properly found that the opinions of Drs. Goldman and Akula were equivocal on the issue of the presence of pneumoconiosis because Dr. Goldman opined that the miner's chronic bronchitis was "possibly" aggravated by coal dust exposure and Dr. Akula merely concluded that "underlying obstructive lung disease cannot be ruled out." *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice*, *supra*; *Campbell*, *supra*; Decision and Order at 24-25; Director's Exhibits 17, 27. Even more specifically, the administrative law judge reasonably determined that Dr. Akula's opinion was less persuasive because, notwithstanding that the physician evaluated the miner for shortness of breath, his examination lacked any diagnostic testing demonstrating the miner's pulmonary condition, *i.e.*, a pulmonary function study or blood gas study, and lacked a detailed coal mine

[6] A review of the record reveals that Drs. Bansal, Iyengar, Boyer, and Dutt treated the miner for his cardiac condition, coronary artery disease, coronary artery bypass surgery, and macroglobulinemia; Dr. Gardberg treated the miner on one occasion for gastroenteritis. Director's Exhibit 27. The administrative law judge properly found that none of these physicians rendered an opinion regarding the presence or absence of pneumoconiosis or referenced coal dust exposure as a contributing factor to the miner's medical problems. 20 C.F.R. §718.201; Decision and Order at 23-24.

employment history. *See Trumbo, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 25. Notwithstanding Dr. Covelli's superior expertise, demonstrated by his Board-certification in internal and pulmonary disease medicine, the administrative law judge rationally found that Dr. Covelli's opinion, that the miner's chronic bronchitis was due to coal dust exposure, contained several flaws rendering it worthy of little weight. Specifically, the administrative law judge discredited Dr. Covelli's opinion because of the physician's reliance on an inaccurate cigarette smoking history, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985), and an exaggerated coal mine employment history, *see Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986), lack of underlying documentation or pulmonary diagnostic testing to support his finding of mild, obstructive ventilatory impairment, *see Christian v. Monsanto Corp.*, 12 BLR 1-56, 1-58 (1988); and reliance on an x-ray interpretation whose reliability was called into question by Dr. Sargent, a physician with radiological expertise superior to that of Dr. Covelli, *see Trumbo, supra*; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 25-26. The administrative law judge's discrediting of Dr. Covelli's opinion was rational. Accordingly, the administrative law judge reasonably accorded the opinions of Drs. Guarda and Perper dispositive weight because these physicians fully discussed their conclusions that the miner's anthracotic pigmentation did not manifest to a finding of pneumoconiosis and that the miner's demise was the result of his heart disease and its deteriorating complications. We, therefore, affirm the administrative law judge's Section 718.202(a)(4) determination as this finding is rational and supported by substantial evidence. As the administrative law judge rationally found that claimant failed to affirmatively establish the existence of pneumoconiosis, by a preponderance of the evidence, we affirm the administrative law judge's determination pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Inasmuch as the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in this Part 718 survivor's case, we affirm the administrative law judge's finding that claimant is not entitled to benefits. *See Trumbo, supra*; *Trent, supra*; *Perry, supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge