BRB Nos. 07-1014 BLA
and 07-1014 BLA-A

G.C. (Widow of H.C.) Claimant-Petitioner v. WHITAKER COAL CORPORATION Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/22/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, and employer cross-appeals, the Decision and Order Denying Benefits (04-BLA-6603) of Administrative Law Judge Alice M. Craft 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 thirty-four years of qualifying coal mine employment, based on the stipulation of the parties,[2] and found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[3] Employer responds in support of the administrative law judge's denial of benefits. Employer also cross-appeals, challenging the administrative law judge's exclusion, pursuant to 20 C.F.R. §725.414, of an autopsy report and a medical opinion proffered by employer at the hearing. The Director, Office of Workers' Compensation Programs, has submitted a limited response, asserting that the administrative law judge's exclusion of the evidence was proper.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[1] Claimant is the widow of the deceased miner, who ceased work in the coal mining industry in 1986, and died on April 3, 2003. Decision and Order at 2-3; Director's Exhibits 3, 6; Hearing Transcript at 12. The miner's 1989 claim for benefits was denied by Administrative Law Judge Robert L. Cox on August 12, 1991, on the basis that although the miner had established the existence of pneumoconiosis by x-ray, the evidence was insufficient to show that he was totally disabled due to pneumoconiosis. Decision and Order at 2; Director's Exhibit 1 at 12.

[2] As the miner's last coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 9; Hearing Transcript at 9; Decision and Order at 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Because no party challenges 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)(2)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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). For survivors' claims filed on or after January 1, 1982, 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. 20 C.F.R. §718.205(c)(1)-(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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). 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, 1-27 (1987).

Claimant first asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians, and on the numerical superiority of x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). We disagree. Our review confirms the administrative law judge's finding that the only x-ray read for pneumoconiosis in connection with the instant claim was interpreted by Dr. Scott, a B reader and Board-certified radiologist, as negative. *See* Director's Exhibit 14. The administrative law judge also noted that "[N]one of the Radiologists who interpreted x-rays taken in connection with the Miner's treatment make any mention of pneumoconiosis," and concluded that, as a result, the record in this survivor's claim contained no x-rays that were positive for pneumoconiosis. Decision and Order at 12. Further, claimant's assertion that the administrative law judge "may have selectively analyzed" the x-ray evidence, is unfounded. Claimant's Brief at 3-4, 7. Claimant has identified no instances in support of her assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). We therefore affirm the administrative law judge's reasoning and her conclusion that claimant failed to meet her burden of proof to establish the existence of pneumoconiosis by x-ray evidence. *See* 20 C.F.R. §§718.202(a)(1), 718.102(b); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 13; Director's Exhibit 14.

Claimant next challenges the administrative law judge's finding that the existence of pneumoconiosis was not established by medical opinion evidence at Section 718.202(a)(4), asserting that the opinions of the miner's treating physicians, Drs. Cornett and Yumang, were documented and well-reasoned. Specifically, claimant asserts that the

administrative law judge interpreted medical tests and substituted her own opinion for that of the physicians. Claimant's arguments are without merit. The administrative law judge accurately reviewed the relevant evidence of record at Section 718.202(a)(4), consisting of the miner's death certificate,[4] autopsy report, numerous treatment notes and hospital records, as well as medical reports from Drs. Vuskovich, Cornett and Yumang. Decision and Order at 8-13. The administrative law judge found that Dr. Cornett treated the miner about once a month from 1996 to 1999. Decision and Order at 8-9; Director's Exhibit 12. Dr. Cornett reported that the miner smoked two packs of cigarettes daily for approximately forty years, and showed symptoms of chronic obstructive pulmonary disease (COPD), tobacco abuse, and coal workers' pneumoconiosis.[5] Director's Exhibit 12 at 70, 75, 77. The administrative law judge noted that Dr. Cornett "generally described (the miner's) COPD and/or pneumoconiosis as stable." Decision and Order at 8-9. Further, the administrative law judge determined that Dr. Yumang treated the miner from 1999 to 2003, initially diagnosing COPD/pneumoconiosis and trigeminal neuralgia. Finally, the administrative law judge observed that "pneumoconiosis was never mentioned again in his notes, but COPD was mentioned several times." Decision and Order at 9; Director's Exhibit 12 at 58.

[4] The death certificate lists the immediate cause of death as "pneumonia," due to or as a consequence of chronic obstructive lung disease, coal workers' pneumoconiosis, and lung cancer. Director's Exhibit 24 at 18. The administrative law judge accurately noted that the form directs the certifier to: "sequentially list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (Disease or injury that initiated events resulting in death) LAST." Decision and Order at 9.

Claimant does not contest the administrative law judge's observation that the death certificate was signed illegibly, and lacked any indicia of personal knowledge of the miner's condition or autopsy results by the certifier. Decision and Order at 9, 13; Director's Exhibit 24 at 18. As such, the administrative law judge permissibly discounted the death certificate as unreasoned and undocumented, and therefore insufficient to support a finding of pneumoconiosis. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *see Smith v. Camco Mining Co.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987). Accordingly, claimant's bare assertions that the evidence may have been "selectively analyzed" and that "the miner's death certificate identified pneumoconiosis as a contributing factor in the miner's death," *see* Claimant's Brief 4, 7, essentially request a reweighing of the evidence beyond the scope of the Board's review. *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20, 1-23 (1988).

[5] The administrative law judge found that the miner "had at least an 80 pack-year history of smoking." Decision and Order at 3.

In contrast, the administrative law judge found that Dr. Vuskovich, who conducted a review of the medical records, as well as the autopsy slides, opined that the miner did not have coal workers' pneumoconiosis or any chronic dust disease or impairment arising out of coal mine employment, and concluded that his most significant source of pulmonary impairment was lung cancer. Decision and Order at 10; Employer's Exhibit 3, 4 at 9-11. Dr. Vuskovich specified that the miner's cause of death was pneumonia following a lung resection, which was a complication of his lung cancer. *Id*. Dr. Vuskovich noted the miner's "long history of heavy smoking, which increased up to three packs a day after he left the mines." Decision and Order at 10; Employer's Exhibit 4.[6] Further, Dr. Vuskovich opined that the miner "did not have pneumoconiosis, based on negative x-ray scan and CT scan, or legal pneumoconiosis, based on his improvement when he quit smoking," as "his condition seemed to dramatically improve, as documented by his treating physicians." Decision and Order at 10; Employer's Exhibit 4 at 6-8. The administrative law judge observed that Dr. Vuskovich, a B reader, is Board-certified in Occupational Medicine. Decision and Order at 10; Employer's Exhibit 5 at 2, 7.

The determination of whether a medical opinion is documented and reasoned is within the province of the administrative law judge, as a matter of assessing credibility. *See Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Moreover, a treating physician's opinion is accorded weight according to its probative value. *See Eastover Mining Co. v. Williams* [*Williams*], 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Specifically, the administrative law judge must consider the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence and be accorded controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole.[7] 20 C.F.R. §718.104(d)(5). The United States Court of Appeals for the Sixth Circuit has held that treating physicians' opinions are neither presumptively correct nor afforded automatic deference in black lung litigation, *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002), but "get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

[6] Dr. Vuskovich stated that the miner's x-ray showed the characteristic changes of hyperinflation and bullae formation from his smoking, ultimately developing into smoking-related lung cancer, for which he underwent lung resection in March 2003, shortly before developing pneumonia. Employer's Exhibit 4 at 5-6.

[7] The administrative law judge noted that no records of the miner's hospitalizations for respiratory or pulmonary disease were offered into evidence. Decision and Order at 9.

Contrary to claimant's arguments, the administrative law judge properly acknowledged the status of Drs. Cornett and Yumang as the miner's treating physicians, reviewing their credentials and the length and frequency of treatment, and summarizing the details of the miner's medical treatment. Decision and Order at 8-9, 12-13. However, she permissibly accorded these medical opinions little weight because they failed to provide the basis for their diagnosis of pneumoconiosis, and were rendered without the benefit of reviewing the miner's biopsy or autopsy reports. *See* 20 C.F.R. §718.104(d)(5); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-22 (1994); *Cosalter v. Mathies Coal Co*., 6 BLR 1-1182 (1984). Decision and Order at 13. Because autopsy reports are the most reliable evidence of the existence of coal workers' pneumoconiosis, *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985), the administrative law judge's identification of this factor in particular is rational. The administrative law judge further acted within her discretion in noting that the only other medical opinion, that of Dr. Vuskovich, concluded that the miner did not have either clinical or legal pneumoconiosis. Significantly, claimant does not contest the administrative law judge's summary of the medical evidence, and fails to identify any instances in which the administrative law judge substituted her own judgment for that of the physicians.

We conclude, therefore, that the administrative law judge's evaluation of the medical opinion evidence is supported by substantial evidence, and constitutes a rational exercise of her discretion to resolve evidentiary conflicts.[8] *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark*, 12 BLR at 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under Section 718.202(a)(4). Because she determined that the opinions of the treating physicians were insufficiently supported by rationale, the only evidence which could support a finding of pneumoconiosis was permissibly discounted, and the uncontested autopsy evidence revealed no evidence of coal worker's pneumoconiosis or any chronic dust disease or impairment arising out of coal mine employment. *See Trumbo*, 17 BLR at 1-88-89 n.4 (1993). We therefore affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

[8] The administrative law judge's findings that both the CT scan and the autopsy report were negative for the presence of pneumoconiosis are not challenged on appeal and are, therefore, affirmed. *Skrack*, 6 BLR at 1-710.

Because substantial evidence supports the administrative law judge's determination that claimant failed to establish that the miner had pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

In light of our disposition affirming the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), and the absence of prejudicial error respecting the administrative law judge's evidentiary exclusions pursuant 20 C.F.R. §725.414, we need not address the merits of employer's cross-appeal.

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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BETTY JEAN HALL
Administrative Appeals Judge