NORMA M. SISSON (Widow of LEROY H. SISSON)	)	BRB No. 98-1400 BLA
Claimant-Petitioner	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	
LEROY H. SISSON	)	BRB No. 99-0578 BLA
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	
Employer-Petitioner	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Rudolf L. Jansen, and the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judges, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

David N. Michael and John A. Washburn (Gould & Ratner), Chicago, Illinois, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-1590) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a miner'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). Claimant[1] appeals the Decision and Order on Remand (95-BLA-0199) of Administrative Law Judge Donald W. Mosser denying benefits on a survivor's claim.[2]

After crediting the miner with twenty-eight years of coal mine employment, Judge Jansen found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). Judge Jansen also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Jansen awarded benefits. By Decision and Order dated April 29, 1994, the Board affirmed Judge Jansen's findings at 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204. *Sisson v. Consolidation Coal Co.*, BRB No. 92-2470 BLA (Apr. 29, 1994)(unpub.). The Board, therefore, affirmed Judge Jansen's award of benefits. Id. However, the United States Court of Appeals for the Seventh Circuit vacated Judge Jansen's award of benefits and remanded the case for further consideration. *Consolidation Coal Co. v. Office of Workers' Compensation Programs* [*Sisson*], 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995). The bases of the Seventh Circuit's decision were that Judge Jansen applied the true doubt rule and that Judge Jansen mechanically

[1]Claimant is the widow of the miner, Leroy H. Sisson, who died on June 19, 1993. Director's Exhibits 1, 4. The miner filed his claim on November 27, 1989, and claimant filed her survivor's claim on July 16, 1993.

[2]By Order dated April 2, 1999, the Board consolidated these appeals.

accorded greater weight to Dr. Combs' opinion based on his status as the miner's treating physician. *See Sisson, supra*.

On remand, Judge Jansen, based on employer's concession, found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b). Further, Judge Jansen found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c), and sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, Judge Jansen again awarded benefits in the miner's claim.

On appeal, employer challenges Judge Jansen's findings that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c), and that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of Judge Jansen's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

In his initial consideration of the survivor's claim, Judge Mosser found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2) and 718.203(b). However, Judge Mosser found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1)-(3). Accordingly, Judge Mosser denied benefits. By Decision and Order dated October 21, 1997, the Board affirmed Judge Mosser's findings at 20 C.F.R. §§718.202(a)(2), 718.203(b) and 718.205(c)(3). *Sisson v. Consolidation Coal Co.*, BRB No. 97-0228 BLA (Oct. 21, 1997)(unpub.). After holding that 20 C.F.R. §718.205(c)(4) was not relevant in this case, the Board vacated Judge Mosser's findings at 20 C.F.R. §718.205(c)(1) and (c)(2), and remanded the case for further consideration. *Id*.

On remand, Judge Mosser found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Mosser again denied benefits. On appeal, claimant challenges Judge Mosser's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of Judge Mosser's Decision and Order on Remand. The Director has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address employer's contention that Judge Jansen erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Whereas Dr. Combs opined that the miner suffered from a totally disabling respiratory impairment, Dr. Selby opined that the miner did not suffer from a totally disabling respiratory impairment. Director's Exhibit 37. Dr. Wihelmus opined that the miner suffered from a minimal impairment. Director's Exhibit 17. Employer, citing *Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992), asserts that Judge Jansen erred in according greater weight to the opinion of Dr. Combs based on his status as the miner's treating physician. While the Seventh Circuit, citing *Franklin, supra*, held that Judge Jansen erroneously gave greater weight to the opinion of Dr. Combs simply because he was the miner's treating physician, the Seventh Circuit did not preclude Judge Jansen from according greater weight to Dr. Combs' opinion based on his status as the miner's treating physician. *See Consolidation Coal Co. v. Office of Workers' Compensation Programs* [*Sisson*], 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995). Rather, the Seventh Circuit stated that "on remand the ALJ should explain or abandon his conclusion that Dr. Combs' opinion is better reasoned than the opinions of Drs. Wilhelmus and Selby." *Sisson*, 54 F.3d at 438, 19 BLR at 2-163. In *Franklin*, the Seventh Circuit held that the administrative law judge erred in according deference to the opinion of a treating physician over the contrary opinion of a consulting physician who had seen the miner only once. The Seventh Circuit reasoned that it had not been established that the treating physician's ability to observe the miner over an extended period of time was essential to an understanding of the miner's condition or that the treating physician knew anything about the disease in question.

However, the facts in the instant case are distinguishable from the facts in *Franklin*. Here, as Judge Jansen stated, "Dr. Combs based his medical report on several examinations, x-ray evidence, medical history, a history of never smoking, symptomatology, pulmonary function studies and blood gas studies." Decision and Order on Remand at 7. Further, as Judge Jansen stated, Dr. Combs "is [B]oard-certified in internal medicine and his qualifications were also made part of the record." *Id*. Hence, Judge Jansen reasoned that "it would seem that this is an instance where the opinion of a treating physician is deserving of greater probative weight, as he has shown that his opinion is based on the relevant information about the claimant's pulmonary condition that he gained over a period of time from examinations and from objective studies, as opposed to knowledge gained by a specialist on only one occasion." *Id*.

Further, Judge Jansen stated that "[w]hether or not Dr. Combs was considered [the miner's] treating physician, this doctor nevertheless had a significantly greater opportunity to observe [the miner's] symptoms and progressive worsening of his respiratory impairment, treating him at least five or six times over the course of a year."[3] *Id*. at 6. In this regard, Judge Jansen found that "the [miner], during his last year of coal mine employment, worked as a mine manager six to seven days a week, walking three to four miles a day, carrying underground gear weighing 18 to 25 pounds." *Id*. at 8. Judge Jansen stated that "Dr. Combs' opinion, that the miner could not return to his last coal mining work in that capacity, was based on the understanding that [the miner] was required to perform at this or a lesser exertional level." *Id*. In contrast, Judge Jansen stated that "Dr. Wilhelmus's opinion is entitled to less weight because of his apparent unfamiliarity with those exertional requirements." *Id*. at 8. Similarly, Judge Jansen stated that because "Dr. Selby reported that [the miner] could perform 'any and all past coal mining duties that have been required of him' without describing those duties or revealing that he was aware of the exertional responsibilities..., his opinion in this regard is also entitled to less weight." *Id*. Thus, inasmuch as Judge Jansen, as trier of fact, rationally explained why he found that Dr. Combs, as the miner's treating physician, was more familiar with the miner's condition prior to his death, *see Franklin, supra*; *see also Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), we reject employer's assertion that Judge Jansen erred in according greater weight to Dr. Combs' opinion based on his status as the miner's treating physician. Judge Jansen did not mechanically accord greater weight to Dr. Combs' opinion based on his status as the miner's treating physician. Therefore, inasmuch as it is supported by substantial evidence, we affirm Judge Jansen's finding that the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

[3]Administrative Law Judge Rudolf L. Jansen stated that although "[e]mployer has argued that Dr. Combs had seen the claimant on only three occasions prior to this physician's written examination report dated April 8, 1991..., the record contains Dr. Combs' subsequent deposition, taken in June of 1991, after [the miner] had visited Dr. Combs at least two or three more times." Decision and Order on Remand at 6; Director's Exhibit 37 (Dr. Combs' Deposition at 18).

Employer also contends that Judge Jansen erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The Seventh Circuit has held that in order to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), a claimant must prove by a preponderance of the evidence that his pneumoconiosis is a contributing cause of his total disability, such that his pneumoconiosis must be a necessary, but need not be a sufficient condition of his total disability. *See Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). Whereas Drs. Combs and Jones opined that the miner suffered from a totally disabling respiratory impairment due to pneumoconiosis, Director's Exhibit 37, Drs. Bush and Selby opined that the miner did not suffer from a totally disabling respiratory impairment due to pneumoconiosis, Director's Exhibits 37, 39. Dr. Wilhelmus opined that the miner suffered from a minimal impairment which was due to the miner being overweight and out of condition. Director's Exhibit 17. Drs. Askin and Heidingsfelder did not render an opinion with regard to the issue of total disability causation. Director's Exhibits 37, 49. Judge Jansen, as trier of fact, permissibly accorded greater weight to the opinion of Dr. Combs than to the contrary opinions of record because he found that Dr. Combs, as the miner's treating physician, was more familiar with the miner's pulmonary condition. *See Franklin, supra*.

Additionally, Judge Jansen permissibly discredited the opinions of Drs. Selby and Wilhelmus concerning the cause of the miner's disability because the doctors' underlying premise, that the miner did not suffer from pneumoconiosis, was inaccurate. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *but see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990). Further, Judge Jansen rationally found that the "new autopsy evidence [of Drs. Bush and Jones] weighs neither in favor nor against a finding that pneumoconiosis contributed to the [miner's] disability, given the physicians' equal qualifications and equally probative opinions." Decision and Order on Remand at 9; *see Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Employer asserts that the medical evidence is insufficient to satisfy the disability causation standard enunciated by the Seventh Circuit in *Shelton*. As previously noted, Dr. Combs opined that the miner suffered from a totally disabling pulmonary impairment due to pneumoconiosis. Director's Exhibit 37. Hence, inasmuch as Judge Jansen, as trier of fact, rationally found, based on Dr. Combs'

opinion, that pneumoconiosis is a contributing cause of claimant's disability, we reject employer's assertion that the medical opinion evidence is insufficient to satisfy the disability causation standard enunciated in *Hawkins*. The Seventh Circuit stated that "*Hawkins* explicitly declined to heighten a miner's burden further by requiring that he prove that pneumoconiosis was a 'substantially' or 'primary' cause of total disability."[4] *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 480, 15 BLR 2-79, 2-83 (7th Cir. 1991). Moreover, inasmuch as it is supported by substantial evidence, we affirm Judge Jansen's finding that the medical opinion evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Inasmuch as employer raises no other issues at 20 C.F.R. §718.204, we affirm Judge Jansen's award of benefits in the miner's claim.

Next, we address claimant's contention that Judge Mosser, in his consideration of the survivor's claim, erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[5] *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of

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[4]The United States Court of Appeals for the Seventh Circuit stated that "[w]hen a physician asserts that pneumoconiosis contributes to a miner's disability, ALJ's (sic) should not be required to make a medical assessment of whether pneumoconiosis substantially contributes to a miner's total disability." *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 482, 15 BLR 2-79, 2-85 (7th Cir. 1991). Further, the Seventh Circuit noted that claimants must prove a simple "but for" nexus to be entitled to benefits. *Compton*, 933 F.2d at 480, 15 BLR at 2-83.

[5]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *See Boyd*, *supra*. The Seventh Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *See Peabody v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Claimant asserts that Judge Mosser applied an incorrect standard for establishing whether the miner's pneumoconiosis was a substantially contributing cause or factor leading to his death. Contrary to claimant's assertion, Judge Mosser, citing *Railey*, correctly applied the appropriate standard adopted by the Seventh Circuit with regard to the cause of the miner's death. Judge Mosser stated that "[l]ike several other circuits, the United States Court of Appeals for the Seventh Circuit has interpreted 'substantially contributing cause' to include a hastening of a miner's death." Decision and Order on Remand at 3. Further, Judge Mosser explained that "[t]his interpretation means that any acceleration of her husband's death that is attributable to pneumoconiosis will entitle [claimant] to benefits." *Id*.

Claimant also asserts that Judge Mosser erred in discrediting Dr. Jones' opinion. In finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), Judge Mosser considered the death certificate signed by Dr. Sultani and the relevant medical reports of Drs. Askin, Bush and Jones.[6] Whereas Dr. Jones opined that "the coal workers' pneumoconiosis present was sufficient to have resulted in respiratory disability, impairment and death," Claimant's Exhibit 2, Drs. Askin and Bush opined that pneumoconiosis did not cause, contribute to or hasten the miner's death. Employer's Exhibits 1, 3, 5. The death certificate indicated that renal cell carcinoma was the cause of the miner's death.[7] Director's Exhibit 4. Judge Mosser properly

[6]Although Dr. Heidingsfelder noted findings on the miner's autopsy slides which are consistent with black lung disease, he did not opine that pneumoconiosis caused, contributed to or hastened the miner's death. Director's Exhibit 5; Claimant's Exhibit 1.

[7]Administrative Law Judge Donald W. Mosser, citing *Addison v. Director, OWCP*, 11 BLR 1-68 (1988), stated that "[a]s there is no indication that Dr. Sultani possessed any personal knowledge of [the miner] or his condition, the death certificate is unreliable, and entitled to little evidentiary weight." Decision and Order on Remand at 3.

discredited the opinion of Dr. Jones because he found it to be not well reasoned.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertion that Judge Mosser erred in discrediting Dr. Jones' opinion. Moreover, inasmuch as Judge Mosser properly discredited the only medical opinion of record that could support a finding that pneumoconiosis hastened the miner's death, we affirm Judge Mosser's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Railey, supra*.

Hence, in view of the recommended affirmance of Judge Mosser's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trumbo, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm Judge Mosser's denial of benefits in the survivor's claim.

[8]Judge Mosser stated that "Dr. Jones has not explained *how* pneumoconiosis affects the spread of renal cell carcinoma." Decision and Order on Remand at 4. Judge Mosser also stated that Dr. Jones' "vague explanation that it is a principle of medicine that the lungs are associated with vital functions is insufficient, particularly in light of the fact that he does not specify what vital function the lungs are connected to which hastened the spread of the cancer." *Id*. Further, Judge Mosser stated that "[t]his nexus between the pneumoconiosis and the renal carcinoma is the key to Dr. Jones' opinion." *Id*. Lastly, Judge Mosser stated that "[w]ithout an adequate explanation of this link, I cannot find Dr. Jones' report to be reasoned." *Id*.

Accordingly, these consolidated appeals are disposed of as follows:

1. In *Sisson v. Consolidation Coal Co.*, BRB No. 99-0578 BLA, Judge Jansen's Decision and Order on Remand awarding benefits in the miner's claim is affirmed.

2. In *Sisson v. Consolidation Coal Co.*, BRB No. 98-1400 BLA, Judge Mosser's Decision and Order on Remand denying benefits in the survivor's is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge