

BRB No. 99-1078 BLA

NANNIE SIZEMORE)	
(o/b/o and Widow of HENRY SIZEMORE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits on Both Claims (98-BLA-1167) of Administrative Law Judge Robert L. Hillyard on a miner's and a survivor's

¹ Claimant, Nannie Sizemore, is the widow of Henry Sizemore, the miner, who died on September 18, 1997. Director's Exhibit 12. The miner filed his first application for benefits on May 19, 1983, which the Department of Labor deemed abandoned on February 16, 1984. Director's Exhibits 33, 41. The miner took no further action on this claim, and subsequently, filed a second application for benefits on October 12, 1989. Director's Exhibit 1. The widow filed her application for benefits on October 6, 1997. Director's Exhibit 2. Both claims are presently pending.

claims 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). This case is before the Board for the third time. Adjudicating the miner's second claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially credited the miner with ten years of qualifying coal mine employment. Next, the administrative law judge determined that, because the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), he failed to demonstrate a material change in conditions under 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits. Director's Exhibit 47.

The miner appealed and the Board determined that the administrative law judge's application of the standard in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), for determining whether a material change in conditions had been established in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit was harmless error inasmuch the administrative law judge properly adjudicated the claim on the merits. The Board affirmed the administrative law judge's findings that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) based on his review of the evidence and accordingly, affirmed the denial of benefits. *Sizemore v. Director, OWCP*, BRB No. 93-0158 BLA (Jul. 28, 1994)(unpub.); Director's Exhibit 65.

Subsequently, the miner filed a request for modification on October 31, 1984. Director's Exhibit 66. The administrative law judge determined that a formal hearing on modification was not necessary or required in this case and rendered a decision on the evidentiary record. The administrative law judge found that the miner failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), and, therefore, that the miner failed to establish a "material" change in conditions. The administrative law judge also determined that there was no mistake in a determination of fact in the previous decision pursuant to Section 725.310. Accordingly, the administrative law judge denied benefits. Director's Exhibit 84.

The miner appealed and the Board affirmed the administrative law judge's denial. *Sizemore v. Director, OWCP*, BRB No. 96-1100 BLA (Nov. 26, 1996) (unpub.); Director's Exhibit 89. The Board denied claimant's motion for reconsideration on May 21, 1997. The miner again requested modification. Director's Exhibit 93. The miner died on September 18, 1997, Director's Exhibit 12, and his widow, (the claimant) filed a survivor's claim for benefits on October 6, 1997, Director's Exhibit 2. The miner's request for modification and the widow's claim were denied. (Director's Exhibits 107, 108, 115, 117).

Claimant appealed the district director's denial of the miner's request for modification and the denial of her survivor's claim. Pursuant to a formal hearing held on February 25, 1999, the administrative law judge found that because the evidence submitted since the prior

denial of the miner's claim failed to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), the miner failed to establish a change in conditions pursuant to Section 725.310. The administrative law judge also determined that, after a review of the record in its entirety, no mistake in a determination of fact had been made in the previous decision. Accordingly, the administrative law judge again denied benefits on the miner's claim. Regarding the survivor's claim, the administrative law judge denied benefits since he found that there was no evidence to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

On appeal, claimant contests the administrative law judge's findings that she failed to establish modification pursuant to Section 725.310 in the miner's claim based on her failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4) and total disability pursuant to Section 718.204(c)(4). In addition, claimant contests the administrative law judge's findings that she failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) in her claim. The Director, Office of Workers' Compensation Programs, urges that the denials on both claims be affirmed.²

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 the applicable law, they are binding upon this Board and may not be disturbed. 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).

² We affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2) and (a)(3) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 9.

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to benefits on a survivor's claim filed on or after January 1, 1982, a 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. §§718.202(a), 718.203(a), 718.205(a). Death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *See Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis because he relied "almost solely" on the radiological qualifications of the physicians and the numerical superiority of the negative x-ray readings.

Contrary to claimant's arguments, the regulations mandate that in evaluating conflicting *x-ray reports*, "consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). Decision and Order at 9; Director's Exhibits 16, 97. After examining each x-ray reading and evaluating those rendered by Board-certified radiologists, who were also B-readers, the administrative law judge, within a proper exercise of his discretion, found that the sole positive x-ray reading rendered by a physician who has no special radiological expertise, was outweighed by the eight negative x-ray readings, six of which were rendered by dually qualified radiologists. *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 9. Because the administrative law judge permissibly accorded greater weight to the negative readings by the radiologists with the dual qualifications, he concluded that the preponderance of the x-ray evidence failed to the existence of pneumoconiosis pursuant to 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). Inasmuch as the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we reject claimant's

arguments. *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).³

Claimant next argues that the administrative law judge erred in not finding the existence of pneumoconiosis established at Section 718.202(a)(4) based on Dr. James's report, which claimant argues is entitled to greater weight than the opinions of the other physicians, because it is better reasoned and Dr. James was the miner's treating physician. The administrative law judge reasonably found Dr. James's opinion worthy of little weight, however, because he found that Dr. James provided little support for his conclusion regarding the existence of pneumoconiosis other than an x-ray interpretation, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989), and because Dr. James relied on a greatly inflated coal mine employment history of fifty years,⁴ *see Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985); Decision and Order at 9; Director's Exhibits 83, 114, 116. Although the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians, *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993), deference to the treating physician's opinion is not required where, as in the instant case, a treating physician's opinion contains deficiencies, *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). We, therefore, reject claimant's argument that the administrative law judge erred in not according dispositive weight to Dr. James's opinion.

³ The administrative law judge correctly found that Dr. Eickler's reading that "there is opacification of the right lung base consistent with a pneumonia" not based on the ILO-U/C classification system. *See* 20 C.F.R. §718.102(b).

⁴ The administrative law judge credited the miner with ten years of qualifying coal mine employment, a determination that was previously affirmed by the Board. *Sizemore v. Director, OWCP*, BRB No. 93-0158 BLA, *slip op.* at 2 n.2 (Jul. 28, 1994)(unpub.); Director's Exhibit 65 at 2 n.2; *see* Director's Exhibit 47 at 3.

Claimant also contends that the administrative law judge impermissibly discredited Dr. Bushey's report because it was based on positive x-ray interpretation. We disagree. The administrative law judge properly found that Dr. Bushey's diagnosis of pneumoconiosis, which "mirrored" his x-ray reading of "2/2, p/p," was entitled to little weight inasmuch as the reliability of Dr. Bushey's opinion was questionable in light of the negative rereadings of his x-ray by Drs. Sargent and Gordonson, physicians with superior radiological expertise. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984), *citing Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 9-10; Director's Exhibits 29, 83. In addition, the administrative law judge reasonably accorded less weight to Dr. Bushey's opinion because it lacked objective support, *see Trumbo, supra; King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985), and was based on an inaccurate coal mine employment history of twenty years, *see Sellards, supra; Fitch, supra; Hall, supra*; Decision and Order at 9-10. The administrative law judge properly found the contrary opinion of Dr. Williams worthy of substantial weight because his opinion was supported by objective medical evidence and was well explained. *See Trumbo, supra; Clark, supra; Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Hence, we affirm the administrative law judge's determination that because Dr. Williams' opinion outweighed those of Drs. James and Bushey, claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) by a preponderance of the medical opinion evidence inasmuch as this finding is rational and supported by substantial evidence.

Claimant additionally avers that the administrative law judge "may have selectively analyzed the medical evidence." Claimant, however, fails to further delineate how the administrative law judge erred in his analysis of the medical evidence. Inasmuch as claimant does not otherwise offer a legal or factual challenge to the administrative law judge's analysis or state with specificity an allegation of error, we affirm the administrative law judge's findings that she failed to establish entitlement to benefits. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*; 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Inasmuch as the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) by a preponderance of the evidence, a requisite element of entitlement in both claims under Part 718, we affirm his determination that claimant failed to satisfy her burden of establishing entitlement on both the miner's and survivor's claims.⁵ *See Trumbo, supra; Trent v. Director, OWCP*, 11 BLR 1-

⁵ Inasmuch as we affirm the administrative law judge's determination that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement in both the miner's and survivor's claims, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we need not address the

26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

administrative law judge's findings on modification regarding total disability in the miner's claim or death due to pneumoconiosis in the survivor's claim. *See Trumbo, supra*.