

BRB No. 01-0803 BLA

STANLEY PHIPPS	)	
(Administrator of the Estate of	)	
DORIS PHIPPS, Widow of	)	
CHESTER B. PHIPPS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
H & P COAL COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN RESOURCES	)	
INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSTION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Stanley Phipps on behalf of the Estate of Doris Phipps, Gray, Kentucky, *pro se*.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Mary Forrest-Doyle (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate  
Solicitor; Rae Ellen Frank James, Deputy 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,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order B Denial of Benefits (01-BLA-0250) of Administrative Law Judge Robert L. Hillyard 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).<sup>2</sup> The administrative law judge credited the miner with thirty-three years and three months of coal mine employment. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(2000), and insufficient to establish that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c)(2000).<sup>3</sup> Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in his consideration of the x-ray evidence and the medical opinion evidence. In addition, claimant asserts that the administrative law judge did not consider all of the evidence. Employer/carrier responds, urging affirmance of the denial of benefits.<sup>4</sup> The Director, Office of Workers= Compensation Programs, has not filed a brief in this case. In its reply brief, claimant asserts that Dr. Broudy=s opinion is hostile to the Act. Claimant also states that Stanley Phipps, the administrator of the estate, is the only surviving officer of employer, and contends that, contrary to the statements in employer/carrier=s brief, it is his desire that benefits be awarded.<sup>5</sup>

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<sup>1</sup> This survivor=s claim was filed by Doris Phipps, the widow of Chester Phipps, the miner. The case is being pursued by Stanley Phipps, on behalf of the Estate of Doris Phipps. *See generally* Director=s Exhibit 26. The estate is being referred to as the claimant. Claimant has submitted a brief in support of its appeal, and a reply brief. These briefs are signed by Felicia Paul, one of the children of Doris Phipps, and the sister of Stanley Phipps.

<sup>2</sup> 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.

<sup>3</sup> Although the administrative law judge stated that application of the amended regulations would not impact the outcome of this case, *see* Decision and Order at 13, it does not appear that the administrative law judge applied the amended regulations in his consideration of this case.

<sup>4</sup> The administrative law judge found that employer is H & P Coal Company. The administrative law judge found that American Resources Insurance Company is the carrier, and that it would be responsible for the payment of any benefits awarded. *See* Decision and Order at 4-5.

<sup>5</sup> The record reflects that before the Office of Administrative Law Judges a hearing was

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death.<sup>6</sup> 20 C.F.R. § 718.205(c). See 20 C.F.R. §§ 718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death under Section 718.205(c)(2000) if the disease actually hastens his death. See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

The administrative law judge noted that the record contains five medical opinions addressing the cause of the miner's death,<sup>7</sup>

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scheduled and noticed but at claimant's request, the case was decided on the record. Claimant was not represented before the administrative law judge, and after consideration of the evidence of record, we hold that the administrative law judge handled the case in a manner consistent with claimant's right to due process. See *Churpak v. Director, OWCP*, 9 BLR 1-71, 1-73 (1986); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

<sup>6</sup> 20 C.F.R. § 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 establishes that pneumoconiosis was the cause of the miner's death, 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.
- (5) Pneumoconiosis is a substantially contributing cause<sup>@</sup> of a miner's death if it hastens the miner's death.

20 C.F.R. § 718.204(c)(1)-(3), (5).

<sup>7</sup> Dr. Baker, in a one paragraph letter, indicated that the presence of coal workers' pneumoconiosis would complicate the miner's recovery from his sepsis syndrome and

and found that the opinions of Drs. Saha, Broudy and Burki do not support a finding of death due to pneumoconiosis. The administrative law judge accorded greater weight to the opinions of Drs. Broudy and Burki, as in his Section 718.202(a)(4)(2000) analysis, where he found Dr. Broudy=s opinion to be well reasoned and documented and supported by the evidence, and he found Dr. Burki=s opinion to be supported by the evidence on which he relied. Decision and Order at 11, 13. The administrative law judge found that Dr. Baker=s opinion, that pneumoconiosis could possibly have hastened the miner=s death, is equivocal and he found that Dr. Bushey=s opinion, that the miner=s death was due to pneumoconiosis, is cursory and unreasoned. Decision and Order at 13. Thus, the administrative law judge found the evidence insufficient to establish that the miner=s death was due to pneumoconiosis.

As an initial matter, we reject claimant=s assertion that the administrative law judge erred by failing to accord preference to the miner=s treating physician, in violation of Section 718.104(d). The requirement that special consideration be accorded to a treating physician=s report, contained in Section 718.104(d), applies only to evidence developed after January 19, 2001. See 20 C.F.R. § 718.101(b). Since the record does not contain any evidence developed after January 19, 2001, this provision does not apply in this case.

Similarly, we reject claimant=s assertion that Dr. Broudy=s opinion is hostile to the Act. The Board has held that a medical opinion is deemed to be contrary to the spirit of the Act if the physician forecloses all possibility that simple pneumoconiosis can be totally disabling. See *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). Claimant refers to a comment made by Dr. Broudy that simple coal workers= pneumoconiosis is not associated with increased morbidity, Director=s Exhibit 34 at Employer=s Exhibit 2, and asserts that this statement implies that simple coal workers= pneumoconiosis is not disabling. Since the physician has not specifically foreclosed all possibility that simple pneumoconiosis can be totally disabling, see *Searls, supra*, we reject claimant=s contention that Dr. Broudy=s opinion is hostile to the Act.

In addition, we reject claimant=s assertion that it was error for the administrative law judge to give no weight to the medical literature claimant submitted. Director=s Exhibit 43 at Claimant=s Exhibits 20, 22-31, 36, 39-49. The administrative law judge properly did not address these exhibits in his Decision and Order, since he stated that he would not consider this evidence as it does not specifically address the miner=s condition. See Decision and Order at 6. Thus, the administrative law judge did not err by finding that

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possibly could have hastened his death as well. Director=s Exhibit 34 at Claimant=s Exhibit 1. Dr. Bushey, in a one paragraph letter, opined that the miner=s pneumoconiosis complicated the treatment for his aortic aneurysm and sepsis and led to the need to be on a respirator and contributed substantially to the miner=s death. Director=s Exhibit 34 at Claimant=s Exhibit 3; Director=s Exhibit 11. Dr. Broudy reviewed the miner=s medical records and opined that the miner=s death was due to complications from surgery for an abdominal aortic aneurysm, when he developed a sepsis syndrome. Dr. Broudy stated that there is no evidence that pneumoconiosis caused, contributed to or hastened the miner=s death. Director=s Exhibit 34 at Employer=s Exhibit 2. Dr. Burki reviewed the miner=s medical records and stated that the miner=s death was not due to pneumoconiosis, nor was his death hastened by pneumoconiosis. Director=s Exhibit 29. Dr. Saha signed the miner=s death certificate, where he indicated that the immediate cause of the miner=s death was sepsis and that this condition was due to the miner=s abdominal aortic aneurysm. Director=s Exhibit 6.

this evidence is not relevant to his decision making process. See *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

We affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2000). The administrative law judge, who is charged with evaluating the evidence and determining the credibility of the medical opinions, see *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Lafferty, supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), permissibly determined that Dr. Baker's opinion regarding the relationship between pneumoconiosis and the miner's death, see Director's Exhibit 34 at Claimant's Exhibit 1, is too equivocal to support a finding of death due to pneumoconiosis pursuant to Section 718.205(c)(2000). See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985).

We also affirm the administrative law judge's finding that Dr. Bushey's opinion is not entitled to determinative weight because it is cursory and unreasoned. In order to be relied upon, a medical opinion must be both documented and reasoned. The Board has held that in order to be considered documented, a medical opinion must set forth the clinical findings, observations and facts upon which the physician based his diagnosis. In order to be considered reasoned, the documentation must support the physician's assessment of the miner's condition. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). While, as claimant asserts, there is evidence in the record indicating that Dr. Bushey was claimant's personal physician, see Director's Exhibit 43 at Claimant's Exhibit 18, the administrative law judge permissibly determined that Dr. Bushey's opinion regarding the cause of the miner's death is not well-reasoned, as the physician failed to explain his opinion. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988).

Finally, claimant questions the reliability of Dr. Broudy's opinion in view of the fact that Dr. Broudy used two different dates of death in his opinion.<sup>8</sup> Claimant's argument is rejected. A review of the evidence indicates that the death certificate identifies the date of death as April 20, 1998, in the upper right corner, and also has the May 11, 1998 date in the lower right corner after the registrar's signature. We hold that the administrative law judge did not err in finding Dr. Broudy's opinion regarding the cause of the miner's death, probative, irrespective of the error in reporting the date of the miner's death. See *Fields, supra*.

Inasmuch as we reject claimant's assertions regarding the administrative law judge's weighing of the evidence and we affirm the administrative law judge's finding that none of the opinions supportive of claimant's burden to establish that the miner's death was due to pneumoconiosis is entitled to determinative weight, we further affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2000), see *Brown, supra*.

We now turn to claimant's assertion that Stanley Phipps, who is pursuing the survivor's claim as the administrator of the survivor's estate, is also the sole surviving officer of employer, H & P Coal Company, and is the only person authorized to hire anyone on behalf of employer. Claimant contends that Stanley Phipps did not hire counsel, who purports to be representing employer's interest,

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<sup>8</sup> Claimant also maintains that Dr. Broudy believed that the miner was alive on March 27, 2000, and Awant[ed the miner] as a patient.@ Claimant's Brief at 9. Claimant refers to a letter addressed @Dear Pulmonary Patient@ which was sent by the Lexington Clinic, see Claimant's Exhibit 21, where Dr. Broudy is a staff pulmonologist and the Chief of Pulmonary Medicine, see Employer's Exhibit 2, advising the recipient of the letter that their office had moved to a new location. We are not persuaded that the sending of this letter indicates that Dr. Broudy believed that claimant was alive, or that his intent was to solicit the miner to become his patient.

and did not hire Dr. Bushey. Claimant asserts that Stanley Phipps, the only surviving officer of employer, does not support the administrative law judge=s Decision and Order. We reject claimant=s assertions and hold that carrier is properly a party to this claim. See 20 C.F.R. ' 725.364(a)(4); *Caudill Construction Co. v. Abner*, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989); *Warner Coal Co. v. Director, OWCP [Warman]*, 804 F.2d 346 (6th Cir. 1986).

Inasmuch as we affirm the administrative law judge=s finding that claimant has not established that the miner=s death was due to pneumoconiosis pursuant to Section 718.205(c), we need not review the administrative law judge=s findings regarding the existence of pneumoconiosis. See 20 C.F.R. ' 718.202(a)(2000); *Trumbo, supra*.

Accordingly, the administrative law judge=s Decision and Order B Denial of 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