

BRB No. 08-0784 BLA

B.A.	)	
(Widow of R.A.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GATLIFF COAL COMPANY	)	DATE ISSUED: 06/18/2009
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Dennis Nagle (Cole, Cole, Anderson & Nagle, P.S.C.), Barbourville, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (07-BLA-5153) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits on a survivor's

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<sup>1</sup> Claimant is the widow of the miner. Director's Exhibit 2. The miner filed a claim on December 22, 1986 and was awarded benefits. Specifically, Administrative Law Judge Joel R. Williams issued a Decision and Order awarding benefits on March 30, 1990. The miner died on November 16, 2005. Director's Exhibit 7. Claimant filed her survivor's claim on January 23, 2006. Director's Exhibit 2.

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 at least 14 years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a), based on the doctrine of collateral estoppel. The administrative law judge also found that the evidence established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. However, the administrative law judge found that the evidence did not establish 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 challenges the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of survivor's benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>3</sup> 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).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

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<sup>2</sup> Because the administrative law judge's findings that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a) and that pneumoconiosis arising out of coal mine employment was established at 20 C.F.R. §718.203 are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> The record indicates that the miner was last employed in the coal mining industry in Kentucky. Director's Exhibits 3-5. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>4</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

At Section 718.205(c), the administrative law judge considered the death certificate signed by Dr. Morehead, and the reports of Drs. Baker, Vuskovich, and Rosenberg.<sup>5</sup> In the death certificate, Dr. Morehead listed the immediate cause of the miner's death as cardiac arrest. Director's Exhibit 7. Dr. Morehead further listed "unresolving pneumonia" and complicated pneumoconiosis as the underlying causes of the miner's death. *Id.* Dr. Baker opined that the miner had coal workers'

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<sup>4</sup> Section 718.205(c) provides 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.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

<sup>5</sup> The administrative law judge also considered the medical treatment records from Baptist Regional Medical Center and University of Kentucky Hospital. Director's Exhibits 7, 8. The administrative law judge stated that "[t]he treatment records do not diagnose pneumoconiosis nor do they indicate that that disease contributed to the [m]iner's death." Decision and Order at 7. Claimant does not challenge the administrative law judge's findings with regard to the medical treatment records.

pneumoconiosis (CWP) and chronic obstructive pulmonary disease (COPD) that was primarily related to cigarette smoking but was also related to coal dust exposure by some extent. Claimant's Exhibit 1. Dr. Baker further opined that COPD was the primary cause of the miner's death but that pneumoconiosis also played a role in his death. *Id.* By contrast, Dr. Vuskovich opined that the miner's death was not related to pneumoconiosis. Employer's Exhibits 3, 4. Dr. Rosenberg opined that the miner had a severe airways disease related to severe smoking that caused his demise. Further, based on the assumption that the miner had clinical CWP, Dr. Rosenberg opined that the miner's clinical CWP would not have caused the respiratory failure that ultimately led to his death. Employer's Exhibits 2, 10.

The administrative law judge found that the death certificate and Dr. Baker's opinion were not well-reasoned. Decision and Order at 7. In addition, the administrative law judge found that Dr. Baker's opinion was not supported by his treatment records. *Id.* However, the administrative law judge found that the opinions of Drs. Vuskovich and Rosenberg were supported by the treatment records.<sup>6</sup> *Id.* Hence, based on the opinions of Drs. Vuskovich and Rosenberg, the administrative law judge found that pneumoconiosis did not hasten or contribute to the miner's death. *Id.*

Claimant asserts that the administrative law judge erred in discounting the death certificate. Specifically, claimant argues that the administrative law judge misconceived the import of the cause of death that was listed on the death certificate. Claimant maintains that the death certificate bolsters Dr. Baker's opinion that pneumoconiosis contributed to the miner's death. In the death certificate, as previously noted, complicated pneumoconiosis was listed as an underlying cause of the miner's death. Director's Exhibit 7. However, no explanation was provided on the death certificate for this finding. The administrative law judge properly gave less weight to the death certificate because it was not supported by any reasoning. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we reject claimant's assertion that the administrative law judge erred in discounting the death certificate. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Claimant also asserts that the administrative law judge erred in discounting Dr. Baker's opinion because Dr. Baker could not apportion how large of a role the miner's pneumoconiosis played in his death. As previously noted, Dr. Baker opined that the miner had CWP and COPD related to coal dust exposure and cigarette smoking.

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<sup>6</sup> Claimant does not challenge the administrative law judge's findings with regard to the opinions of Drs. Vuskovich and Rosenberg.

Claimant's Exhibit 1. Dr. Baker noted that it was very difficult to separate the two etiologies of a lung disease when a miner had exposure to both of them. *Id.* Nonetheless, Dr. Baker opined that cigarette smoking had a major role in the miner's obstructive airway disease and coal dust exposure contributed to his condition as well. *Id.* Dr. Baker further opined that while the miner's COPD was the primary cause of his death, his pneumoconiosis played a role in his death.<sup>7</sup> In finding that Dr. Baker's opinion was not persuasive, the administrative law judge stated:

As noted, [Dr. Baker's] treatment records contain no reasoning to justify the diagnoses rendered therein. His report of October 15, 2007 does not persuasively explain why the [m]iner's fourteen-year history of coal mine dust exposure, which produced no definite evidence of pneumoconiosis on x-ray, contributed to his severe obstructive airway disease. Dr. Baker concedes that the airway disease present in the [m]iner was primarily contributed to by the [m]iner's 60-pack year history of cigarette smoking. Dr. Baker's opinion that the [m]iner's pneumoconiosis played a role in his death, based on the fact that he had a pulmonary death and his lungs were unable to resolve the pneumonia in a patient with a severe obstructive defect does not sufficiently explain how Dr. Baker is able to diagnose pneumoconiosis or link the disease to the [m]iner's death.

Decision and Order at 7.

In addition, the administrative law judge found that Dr. Baker's statement regarding the difficulty in separating and identifying the etiologies of the miner's lung disease cannot meet claimant's burden of proof on the issue of death causation. *Id.*

The administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because the

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<sup>7</sup> In explaining why he opined that pneumoconiosis played a role in the miner's death, Dr. Baker stated that "[t]his would be based on his pulmonary death and the inability of his lungs to resolve the pneumonia in a patient with a severe obstructive defect on pulmonary function testing." Claimant's Exhibit 1.

Dr. Baker further observed: "Patients with severe obstructive airway disease have difficulty clearing secretions and the secretions tend to remain in the lung and cause pneumonia in (sic) a most simplistic explanation. They have difficulty getting rid of secretions and after receiving multiple antibiotics over the course of several years, different organisms that are more resistant to treatment usually develop." *Id.*

administrative law judge properly discounted Dr. Baker's opinion because it was not well-reasoned or supported by his treatment records, *Clark*, 12 BLR at 1-155, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion.

Claimant additionally asserts that the administrative law judge erred in failing to credit Dr. Baker's opinion based upon his status as the miner's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.<sup>8</sup> *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* In this case, the administrative law acknowledged that Dr. Baker was the miner's treating physician. However, the administrative law judge found that Dr. Baker's opinion failed to meet the credibility criterion for a treating physician's opinion, in light of its reasoning and documentation. Decision and Order at 7; 20 C.F.R. §718.104(d). As discussed, *supra*, the administrative law judge properly found that Dr. Baker's opinion was not well-reasoned or supported by his treatment records. *Clark*, 12 BLR at 1-155. Thus, we reject claimant's assertion that the administrative law judge erred in failing to credit Dr. Baker's opinion based upon his status as the miner's treating physician. Furthermore, because the administrative law judge properly discounted the death certificate and Dr. Baker's opinion, the only medical evidence of record that could support a finding that pneumoconiosis caused, contributed to, or hastened the miner's death, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-88.

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<sup>8</sup> Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

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