

BRB No. 03-0542 BLA

MARGARET DIXON)	
(Widow of HERSHEL DIXON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
RAY COAL COMPANY)	DATE ISSUED: 03/31/2004
)	
and)	
)	
SUN COAL COMPANY, c/o)	
ACCORDIA EMPLOYERS SERVICE)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmund Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (02-BLA-0147) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a 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).² This case involves a survivor's claim filed on June 22, 1999. After crediting the miner with at least twelve years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Assuming *arguendo* that the evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that the evidence was insufficient to 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 argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.³

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).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *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

¹ Claimant is the surviving spouse of the deceased miner who died on January 7, 1999. Director's Exhibit 10.

² 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis was due to coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Claimant argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). After noting that many of the x-ray interpretations of record were not properly classified for the existence of pneumoconiosis, the alj considered whether the properly classified x-ray interpretations were sufficient to establish the existence of the disease. Decision and Order at 6. The administrative law judge noted that Drs. Sargent, Scott, and Wheeler, dually qualified B readers and Board-certified radiologists, interpreted the miner's May 26, 1995, May 7, 1996, March 24, 1997, July 6, 1998, and August 26, 1998 x-rays as negative for pneumoconiosis. *Id.*; Director's Exhibits 25, 31. The administrative law judge further noted that Dr. Hayes, a dually qualified B reader and Board-certified radiologist, and Dr. Fino, a B reader, also rendered negative interpretations of claimant's December 18, 1996, December 3, 1998, December 14, 1998, January 1, 1999, and January 3, 1999 chest x-rays. Decision and Order at 7; Employer's Exhibits 1-10. Having found that all of the properly classified x-ray interpretations of record were negative for pneumoconiosis, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 7.

In challenging the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also contends that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* Claimant, however, neither challenges the administrative law judge's characterization of the x-ray evidence nor identifies any positive x-ray interpretations in the record. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge credited the opinions of Drs. Tuteur, Castle and Fino that claimant did not suffer from pneumoconiosis over the

contrary opinions of Drs. James Chaney, George Chaney and Younes.⁴ Decision and Order at 14-15.

Dr. Younes opined that the miner suffered from chronic obstructive pulmonary disease which was partially caused by his occupational dust exposure, a finding which, if credited, could support a diagnosis of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2). Director's Exhibit 26. The administrative law judge, however, properly discredited Dr. Younes's opinion because the doctor failed to provide any reasoning or rationale for his conclusion.⁵ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 14.

The administrative law judge also found that the opinions of Drs. James Chaney and George Chaney were not sufficiently reasoned. Although the administrative law judge recognized that each of these physicians treated the miner during his lifetime, he accurately noted that neither Dr. James Chaney nor Dr. George Chaney made a diagnosis of coal workers' pneumoconiosis until after the miner's death. Decision and Order at 15. While Dr. James Chaney, in completing the miner's final Discharge Summary, diagnosed coal workers' pneumoconiosis, the doctor provided no basis for his opinion. See Director's Exhibit 12. In rendering a diagnosis of coal workers' pneumoconiosis after the miner's death, Dr. George Chaney explained that his opinion was based in part upon an unidentified chest x-ray. See Director's Exhibit 24. The administrative law judge noted, however, that the miner's x-rays were negative for the existence of pneumoconiosis. Decision and Order at 15. Although Dr. George Chaney also attributed the miner's chronic obstructive lung disease in part to his coal dust exposure, he provided no basis for his opinion. See Director's Exhibit 24. Because neither Dr. James Chaney nor Dr. George Chaney provided any explanation for his respective diagnosis of pneumoconiosis, the administrative law judge properly found that their opinions were not sufficiently reasoned. See *Clark, supra*; *Lucostic, supra*; Decision and Order at 15-16.

⁴ The record contains reports from several other physicians, including Drs. Botto, Chandarana, Barnatan and Whalen. None of these doctors diagnosed pneumoconiosis or a coal dust related lung disease. See Director's Exhibit 31.

⁵ In a September 24, 1999 response to a Department of Labor questionnaire, Dr. Burki indicated that the miner did not have an occupational lung disease that was caused by his coal mine employment. Director's Exhibit 13. The administrative law judge, however, discredited Dr. Burki's opinion because he found that it was not sufficiently reasoned. Decision and Order at 14. Because Dr. Burki's opinion does not assist claimant in establishing that the miner suffered from pneumoconiosis, we need not address whether the administrative law judge properly discredited his opinion. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant contends that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. James Chaney and George Chaney based upon their status as the miner's treating physicians. We disagree. 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.⁶ *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (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.* As discussed, *supra*, the administrative law judge properly accorded less weight to the opinions of Drs. James Chaney and George Chaney, that the miner suffered from pneumoconiosis, because he found that their opinions were not sufficiently reasoned. *Clark, supra; Lucostic, supra*; Decision and Order at 14-15.

The administrative law judge also permissibly accorded greater weight to the opinions of Drs. Tuteur, Castle and Fino, that the miner did not suffer from pneumoconiosis, based upon their superior qualifications.⁷ *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 14; Director's Exhibit 31; Employer's Exhibits 11, 12. The administrative law judge also properly found that their opinions were well reasoned and well documented. *See Clark, supra; Lucostic, supra*; Decision and Order at 14.

⁶ Revised 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). Because this regulation applies only to evidence developed after January 19, 2001, *see* 20 C.F.R. §718.101(b), it does not apply to the reports prepared by Drs. James Chaney and George Chaney. The administrative law judge, therefore, should not have applied Section 718.104(d) in this case. *See* Decision and Order at 14-15. However, the administrative law judge's application of Section 718.104(d) constitutes harmless error, given the Sixth Circuit's recognition 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).

⁷ Drs. Tuteur, Castle and Fino are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 31; Employer's Exhibit 2. The qualifications of Drs. James Chaney and George Chaney are not found in the record. Contrary to claimant's contention, the administrative law judge was not required to accord less weight to the opinions of Drs. Tuteur, Castle and Fino because they did not examine the miner. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984).

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits in the survivor's claim under 20 C.F.R. Part 718. *Trumbo, supra*. Consequently, we need not address claimant's contentions of error regarding the administrative law judge's findings at 20 C.F.R. §718.205(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge