

BRB No. 05-0916 BLA

HENRIETTA BLAIR)
(Widow of MERVIL W. BLAIR))
)
 Claimant-Petitioner)
)
 v.)
)
 PEN COAL CORPORATION) DATE ISSUED: 03/22/2006
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Robert G. Miller, Jr. (Perry, Miller & Daniels), Paintsville, Kentucky, for
claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund–
Workers' Compensation Defense Division), Charleston, West Virginia for
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6108) of
Administrative Law Judge Robert D. Kaplan 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). Claimant filed her claim for survivor benefits on October 21, 2002.¹ Director's Exhibit 3. The district director awarded benefits on December 12, 2003. Director's Exhibit 20. At employer's request, the matter was referred to the Office of Administrative Law Judges for consideration.² The administrative law judge found that the medical evidence was insufficient to establish that the miner's death was due to coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in rejecting the opinion of the miner's treating physician that pneumoconiosis hastened the miner's death. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs has declined to file a brief.

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

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816 (6th Cir.1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially

¹ Mervil W. Blair, the miner, filed a claim on September 15, 1999 and was awarded benefits by Administrative Law Judge Daniel J. Roketenetz in a Decision and Order issued on January 26, 2001. Director's Exhibit 1. The miner subsequently died on August 3, 2002 and his widow, the claimant herein, filed the instant survivor's claim for benefits. Director's Exhibits 3, 11.

² The parties waived their right to a formal hearing and agreed to have the case decided on the record. *See* Decision and Order at 2.

³ Because the miner last worked in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

contributing cause or factor leading to the miner's death. Claimant may establish that pneumoconiosis was a substantially contributing cause of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *see also* 20 C.F.R. §718.205(c)(2), (5).

Claimant contends that the administrative law judge erred by not crediting Dr. Fugate's opinion that pneumoconiosis contributed to the miner's death since Dr. Fugate was the miner's treating physician. We disagree.

Although the United States Court of Appeals for the Fourth Circuit has recognized that the opinions of treating and examining physicians deserve special consideration, the court has held that there is no rule that the opinion of a treating or examining physician must be accorded greater weight than the opinions of other physicians. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The revised regulations provide additional guidance: the officer adjudicating the claim is directed to "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); including certain specific factors, which are the nature and duration of the relationship, the frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give a physician's opinion controlling weight in appropriate cases, the weight accorded the opinion must also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

In this case, the administrative law judge properly considered all of the record evidence and found that claimant failed to carry her burden of proof, notwithstanding the support provided by Dr. Fugate's opinion. The administrative law judge noted that the miner underwent surgery for the removal of a malignant brain tumor, which had metastasized from Stage IV lung cancer. Decision and Order at 3. Following an increase in respiratory symptoms, the miner was admitted to the hospital on August 1, 2002 and apparently stopped breathing on August 3, 2002. *Id.* The administrative law judge correctly noted that the death certificate listed the immediate cause of the miner's death as Hypoxia/Anoxia secondary to primary disease/possible pulmonary embolism, and lung cancer with brain metastasis. There was no mention of coal worker's pneumoconiosis.

With respect to Dr. Fugate's opinion, the administrative law judge found that while Dr. Fugate had treated the miner prior to his death for multiple respiratory conditions, her opinion on cause of death could not be deemed reasoned nor documented

since Dr. Fugate “provided no rational explanation for her conclusion that pneumoconiosis contributed to the miner’s death.”⁴ Decision and Order at 6. We agree with the administrative law judge’s assessment of Dr. Fugate’s opinion.

The administrative law judge correctly noted that on February 7, 2003, Dr. Fugate completed a questionnaire in which she stated that the miner suffered from chronic obstructive pulmonary disease (COPD), silicosis and pneumoconiosis. Dr. Fugate opined that pneumoconiosis contributed to the miner’s death, but she provided no explanation for this diagnosis other than to state: “P[atien]t had pneumoconiosis – prior diagnosis.” Decision and Order at 5. The administrative law judge also properly noted that Dr. Fugate “did not address the fact that the miner suffered from lung cancer that metastasized to the brain. Nor did [she] discuss the involvement of the miner’s serious cardiac condition” as reported in the miner’s hospitalization records. Decision and Order at 6; *see* Director’s Exhibit 13.

An administrative law judge, within his discretion as finder-of-fact, may discredit an opinion in which he finds that the doctor failed to adequately explain his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). For the reasons cited in the Decision and Order, we affirm the administrative law judge’s finding that Dr. Fugate’s opinion was neither reasoned nor documented. *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). Since the administrative law judge permissibly discredited the only medical opinion of record that could support a finding that pneumoconiosis contributed to the miner’s death, we affirm as supported by substantial evidence, the administrative law judge’s conclusion that claimant failed to carry her burden of proof to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c).⁵ *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

⁴ The administrative law judge stated that Dr. Fugate had authored several reports dated November 22, December 20, 2000, January 12, February 28, March 14, April 16, June 7, June 19, and August 3, 2001, which diagnosed the miner with chronic obstructive pulmonary disease, history of pneumoconiosis and silicosis. Director’s Exhibit 13; Decision and Order at 4. The administrative law judge further discussed the miner’s treatment records pertaining to his diagnoses of squamous carcinoma of the left lung and a left ventricular heart condition. Director’s Exhibits 13-14; Decision and Order at 4.

⁵ The administrative law judge’s denial of benefits is supported by Dr. Fino’s opinion that the miner’s death was not hastened by pneumoconiosis. Employer’s Exhibit 1; Decision and Order at 6. Although claimant challenges the administrative law judge’s crediting of Dr. Fino’s opinion, we note that regardless of the weight accorded Dr. Fino’s

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

opinion, claimant was unable to establish her entitlement to benefits because her evidence, standing alone, was found to be insufficient to support her burden of proof. *See generally Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).