

BRB No. 06-0678 BLA

VELVIA PRATER)
(Widow of ALEX PRATER))
)
 Claimant-Petitioner)
)
 v.)
)
 WOLFPEN COAL COMPANY) DATE ISSUED: 05/09/2007
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 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-Denying Benefits of Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg,
Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP) Washington, D.C., for
employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order-Denying Benefits (2004-BLA-5714) of Administrative Law Judge Rudolf L. Jansen 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). The administrative law judge found that the parties stipulated to twenty-two years of coal mine employment and that the stipulation was supported by the evidence of record.² Decision and Order at 5. Considering entitlement in this survivor's claim pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that, as the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), claimant was precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 10-20. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to accord superior weight to the medical opinion of Dr. Jurich, based on that physician's status as the miner's treating physician, and erred in finding that Dr. Jurich's opinion was unreasoned. In addition, claimant contends that the administrative law judge arbitrarily refused to consider the miner's hospital and treatment records when considering Dr. Jurich's opinion. Claimant also contends that the administrative law judge erred in according controlling weight to the opinions of Drs. Fino and Dahhan, who had never treated claimant and whose opinions contained significant and troubling inconsistencies. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

¹ Claimant is the widow of a miner who died on February 6, 2002. Director's Exhibit 9. The miner's claim for benefits was finally denied by the Board on July 7, 1998, *Prater v. Wolfpen Coal Company*, BRB No. 97-1396 BLA (July 7, 1998)(unpub.). Claimant filed her application for survivor's benefits on April 1, 2002. Director's Exhibit 3.

² The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as well as the finding that the evidence of record did not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 law. 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).

In order to establish entitlement to benefits, pursuant to 20 C.F.R. 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. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); *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).

Claimant contends that the administrative law judge erred in his consideration of Dr. Jurich's⁴ medical opinion pursuant to the "treating physician" regulation at 20 C.F.R. §718.104(d).⁵ Claimant avers that the administrative law judge erred in rejecting Dr.

⁴ Dr. Jurich opined that the miner suffered from chronic obstructive pulmonary disease related to coal mine employment and noted on the miner's death certificate that pneumoconiosis was a contributing factor in the miner's death. Director's Exhibits 9, 12; Claimant's Exhibit 3.

⁵ Section 718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician:

- 1) Nature of relationship.
- 2) Duration of relationship.
- 3) Frequency of treatment.
- 4) Extent of treatment.

20 C.F.R. §718.104(d)(1)-(4).

Jurich's opinion without first considering the four factors outlined in Section 718.104(d), relevant to the consideration of treating physicians' opinions. Claimant argues that Dr. Jurich's opinion covers the four factors specified in the Section 718.104(d) regulation, *i.e.*, Dr. Jurich treated the miner for respiratory conditions; Dr. Jurich treated the miner for a period of twenty-three years; Dr. Jurich treated the miner on an almost monthly basis; and Dr. Jurich conducted numerous tests and examinations of the miner, and reviewed the miner's x-rays. Claimant's Brief at 15-16. In summary, claimant argues that the administrative law judge's failure to give adequate "consideration to these mandated factors," Claimant's Brief at 16, requires remand of the case to the administrative law judge to first consider Dr. Jurich's opinion in light of these factors.

We reject claimant's assertion that the administrative law judge erred in failing to accord dispositive weight to the opinion of Dr. Jurich because he was the miner's treating physician. Contrary to claimant's assertion, Dr. Jurich's status as the miner's treating physician did not automatically entitle Dr. Jurich's opinion to dispositive weight.

The administrative law judge must determine whether a medical opinion, even if produced by a treating physician, is sufficiently reasoned. 20 C.F.R. 718.104(d)(5); *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Collins v. J & L Steel Co.*, 21 BLR 1-182 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The determination of whether such a medical opinion is sufficiently reasoned is for the administrative law judge as fact-finder, and will be upheld by the Board if supported by substantial weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In the instant case, the administrative law judge rationally found that Dr. Jurich's opinion was not sufficiently reasoned because the physician did not always account for the miner's extensive smoking history.⁶ *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-

The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

⁶ The administrative law judge determined that the record established that the miner smoked three-quarters of a pack of cigarettes per day for thirty-five years.

The administrative law judge noted that while Dr. Jurich was aware of the miner's smoking history in his January 2005 deposition. Claimant's Exhibit 3. In his March 28, 2003 opinion, Dr. Jurich opined that the miner's chronic lung disease was due

52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). In addition, although noting that Dr. Jurich had treated the miner for an extensive period of time, the administrative law judge nonetheless found that the physician's diagnosis of pneumoconiosis was based only on an "assumption" that coal dust contributed to the miner's lung disease. The administrative law judge, therefore, found that it was not a sufficiently reasoned opinion and permissibly found it entitled to little weight. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).⁷ This finding was reasonable and it is, accordingly, affirmed. 20 C.F.R. §718.104(d); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003); *Collins*, 21 BLR at 1-189. Accordingly, we reject claimant's assertion that Dr. Jurich's opinion was entitled to dispositive weight based on his status as the miner's treating physician.

The administrative law judge's finding that Dr. Jurich did not provide a credible, well-reasoned opinion of pneumoconiosis is supported by the record. Claimant has not asserted that any other medical opinion supports a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, claimant is precluded from establishing the existence of the disease at this Section and we need not reach claimant's argument that the administrative law judge erred in crediting the opinions of Drs. Dahhan and Fino, who opined that the miner's death was not due to pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In reaching this determination, we reject claimant's assertion that the miner's hospital records and treatment notes, in conjunction with Dr. Jurich's

to the inhalation of coal dust because the miner was a *non-smoker*. *See* Decision and Order at 19.

⁷ When questioned about the etiology of claimant's condition, Dr. Jurich stated that "[m]e being a family practitioner, I have to *assume* what's the most obvious. The most obvious being, he worked in a coal mine." (emphasis added). Claimant's Exhibit 3 at 12; Decision and Order at 20.

Further, when questioned, on deposition, as to whether cigarette smoking could also have contributed to the miner's chronic lung disease, Dr. Jurich stated that he would "assume" that cigarette smoking was a cause and that he thought that both cigarette smoking and coal dust contributed to the miner's lung disease. Claimant's Exhibit 3 at 13.

opinion, support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge's finding that none of the hospital records diagnosed clinical pneumoconiosis or any disease process linked to coal mine employment is supported by the record.⁸

Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, an award of survivor's benefits is precluded. 20 C.F.R. §718.205(c); *see Trumbo*, 17 BLR at 1-88.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁸ "Clinical" pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis, and includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis and silicotuberculosis. 20 C.F.R. §718.201(a)(1).

"Legal" pneumoconiosis is "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic, restrictive or obstructive lung disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).