

BRB No. 06-0332 BLA

SADIE MARTIN)
(Widow of HENRY MARTIN))
)
 Claimant-Petitioner)
)
 v.)
)
 PIKEVILLE COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 11/16/2006
)
 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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denial of Benefits (05-BLA-5216) of Administrative Law Judge Daniel J. Roketenetz 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 noted that the parties stipulated to thirty-seven years of coal mine employment in the miner’s claim, and he adjudicated the instant claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence does not establish the existence of pneumoconiosis arising out of the miner’s coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203, or that the miner’s death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant details the evidence supportive of her position and states that she believes that it establishes the existence of pneumoconiosis. Claimant states that Dr. Shelton’s opinion is well documented and well reasoned, and she maintains that Dr. Shelton’s opinion should be accorded great weight because he was the miner’s treating physician. Claimant also asserts that the evidence of record satisfies the “hastening death” standard. Claimant contends that the administrative law judge accorded too much weight to the opinion of Dr. Rosenberg, and she asserts that the administrative law judge “must give more weight to a treating physician who [has] superior credentials.” Claimant’s Brief at 10. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has not filed a brief in this appeal.²

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the widow of the miner, who died on April 26, 1997. Director’s Exhibit 12. The administrative law judge noted that the miner’s 1984 claim for benefits was denied by Administrative Law Judge Richard D. Mills in a Decision and Order issued on September 1, 1987. Director’s Exhibit 1.

² We affirm the administrative law judge’s findings that claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The instant survivor's claim was filed in 2003. In order to establish entitlement, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of his coal mine employment, and that the miner's death was due to pneumoconiosis. The regulations provide that death will be considered to be "due to pneumoconiosis" where the medical evidence establishes that the miner's death was due to pneumoconiosis; where pneumoconiosis was a "substantially contributing cause of factor leading to the miner's death or where the death was caused by complications of pneumoconiosis"; or where the presumption contained in 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205.

In considering whether the medical opinion evidence establishes that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed claimant's hospitalization records and Dr. Shelton's treatment records, as well as the miner's death certificate, letters from Dr. Shelton, and Dr. Rosenberg's report. The administrative law judge accorded less weight to Dr. Shelton's treatment records and letter opinions, which diagnose pneumoconiosis. The administrative law judge accorded greater weight to Dr. Rosenberg's opinion that the miner did not have pneumoconiosis. Accordingly, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

The administrative law judge also found that, pursuant to 20 C.F.R. §718.205, the evidence does not establish that pneumoconiosis caused or contributed to the miner's death. The administrative law judge noted that the chronic obstructive pulmonary disease listed on the death certificate as a significant condition which contributed to death, but not resulting in the underlying cause identified, does not constitute legal pneumoconiosis. Director's Exhibit 12. The administrative law judge also discussed Dr. Shelton's medical reports addressing the cause of the miner's death. The administrative law judge accorded less weight to Dr. Shelton's 2004 opinion that the miner's death was due to pneumoconiosis, finding it inconsistent with the physician's earlier opinions addressing the cause of the miner's death. Decision and Order at 13-14. The administrative law judge found that Dr. Rosenberg's consultative opinion is well documented and well reasoned, and the administrative law judge relied upon this opinion to find that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205.

We first consider the administrative law judge's findings pursuant to Section 718.205. The miner died on April 26, 1997. His death certificate was signed by Dr. Shelton, who stated that the immediate cause of the miner's death was sepsis related to pneumonia and pneumocystis, which was due to chronic lymphocytic leukemia. Director's Exhibit 12. In a letter dated October 1, 2003, Dr. Shelton indicated that he had been the miner's treating physician. Dr. Shelton stated that the miner died from *Pneumocystis carinii* pneumonia which he indicated is "an opportunistic organism seen

in patients who are immunocompromised from various conditions. . . .” Director’s Exhibit 15. In a letter dated February 6, 2004, Dr. Shelton stated that the miner died from pneumonia, and he indicated that the miner’s pneumoconiosis contributed to his death “by impairing his ability to clear respiratory secretions and decreasing his pulmonary reserve.” Director’s Exhibit 16. Dr. Rosenberg, a B reader, who is also Board-certified in Internal Medicine, Pulmonary Diseases and Occupational Medicine, provided a consultative opinion. Dr. Rosenberg stated that the miner died “from overwhelming pneumonia. This pneumonia occurred because of his immunocompromised state directly related to his leukemia and chemotherapy. . . .” Employer’s Exhibit 4. Dr. Rosenberg opined that “Clearly, CWP and/or coal dust exposure did not cause or hasten his demise.” Employer’s Exhibit 4.

We reject claimant’s assertion that Dr. Shelton’s opinion is entitled to determinative weight because he treated the miner. The regulations do not require that the opinion of a treating physician be accorded determinative weight. 20 C.F.R. §718.104(d). Rather, Section 718.104(d) sets out the factors to be considered by the adjudicator in evaluating the opinion of a treating physician. In addition, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the opinion of a treating physician is not automatically entitled to deference, but instead, the administrative law judge must consider the credibility of each medical opinion, and the opinion of a treating physician is entitled to deference based on its power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Therefore, a report that the administrative law judge finds is not well reasoned or well documented cannot be rehabilitated, and deemed credible merely because it was written by a treating physician.³ *Williams, supra*.

Claimant sets forth no other specific arguments regarding the administrative law judge’s findings pursuant to Section 718.205. The remainder of claimant’s discussion of Section 718.205 is a recitation of the evidence supportive of her position, and her assertion that she has established that the miner’s death was due to pneumoconiosis pursuant to Section 718.205. The Sixth Circuit has held that merely arguing that the evidence establishes the elements of entitlement is inadequate to initiate a review on the merits. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Further, the Board has held that the summation of favorable evidence does not identify error for the Board to review. *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, there is no further issue for the Board to consider regarding the administrative law

³ We affirm the administrative law judge’s determination that Dr. Shelton’s opinion regarding the cause of the miner’s death is entitled to less weight because of the inconsistencies in his opinion in this regard, as this finding is supported by substantial evidence. See *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); Director’s Exhibits 12, 15, 16.

judge's findings pursuant to Section 718.205. We, thus, affirm the administrative law judge's findings pursuant to Section 718.205. *See* 20 C.F.R. §802.211(b); *see generally* *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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, and thus do not consider claimant's challenges to the administrative law judge's findings regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge