

BRB No. 08-0255 BLA

L.M.)	
(Widow of C.M.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 10/08/2008
)	
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.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (05-BLA-5280) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits on a survivor's

¹ Claimant is the widow of the deceased miner. The miner, who filed claims on June 20, 1973 and April 12, 1984, was awarded benefits. He died on October 4, 2003. Director's Exhibit 10. Claimant filed her survivor's claim on October 21, 2003. Director's Exhibit 3.

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 accepted the parties' stipulation of thirty-seven years of coal mine employment,² and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge also found, however, 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 pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 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.³ *See* 20 C.F.R.

² The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibits 5, 9. 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 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

§§718.3, 718.202, 718.203, 718.205(a); *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). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish 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 *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

At Section 718.205(c), the administrative law judge considered the death certificate completed by Dr. West, the miner's treating physician, and the reports of Drs. Ghio, Repsher, and West.⁴ In the death certificate, Dr. West listed respiratory failure as the immediate cause of the miner's death. Director's Exhibit 10. In an October 4, 2003 report, Dr. West checked a box marked "Yes" to indicate that pneumoconiosis contributed to, or played a hastening role in, the miner's death, and provided the rationale that "[the miner] died of respiratory failure."⁵ Director's Exhibit 11. By contrast, in a February 2, 2005 report, Dr. Ghio opined that coal workers' pneumoconiosis had no relationship to the miner's death. Employer's Exhibit 3. Further, in an April 13, 2005 deposition, Dr. Ghio opined that pneumoconiosis did not contribute to, or hasten, the miner's death. Employer's Exhibit 6 (Dr. Ghio's Deposition at 22). Similarly, in a February 1, 2005 report and a June 17, 2005 deposition, Dr. Repsher opined that coal workers' pneumoconiosis did not cause, contribute to, or in any way hasten the miner's death. Employer's Exhibits 4, 7 (Dr. Repsher's Deposition at 16).

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).

⁴ The administrative law judge stated that "there is no evidence in the treatment records that establishes that pneumoconiosis hastened the miner's death." Decision and Order at 9.

⁵ In his summary of the medical evidence, the administrative law judge noted that "Dr. West opined that the miner's pneumoconiosis played a hastening role in the miner's death, because he 'died of respiratory failure.'" Decision and Order at 7.

The administrative law judge gave little weight to the opinions of Drs. Ghio and Repsher, because he found that they were not well-reasoned. Decision and Order at 9. The administrative law judge also found that Dr. West's opinion was not reasoned. *Id.* Consequently, the administrative law judge concluded that claimant failed to carry her burden of establishing that the miner's death was due to pneumoconiosis.⁶

Claimant initially asserts that the administrative law judge erred in discrediting Dr. West's opinion. Contrary to claimant's assertion, the administrative law judge properly discredited Dr. West's opinion, on the ground that it was not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge specifically found that "[a]lthough Dr. West was the miner's treating physician, his opinion does not contain any reasoning in support of this conclusion or identify the documentation upon which he relied." Decision and Order at 9. The administrative law judge additionally noted that "[m]erely stating that the miner had pneumoconiosis and died 'of respiratory failure' does not constitute a reasoned medical opinion that pneumoconiosis hastened the miner's death." *Id.* Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. West's opinion.

Claimant next asserts that the administrative law judge should have given greater weight to Dr. West's opinion because he was the miner's treating physician. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim 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). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall 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).

Further, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in black lung litigation, the opinions of treating

⁶ In his weighing of the medical evidence at Section 718.205(c), the administrative law judge found that "[t]he only medical evidence which supports [claimant's] position that pneumoconiosis hastened the miner's death is Dr. West's statement that the miner 'died of respiratory failure.'" Decision and Order at 9.

physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, “the opinions of treating physicians get the deference they deserve based on their power to persuade.” *Williams*, 277 F.3d at 513, 22 BLR at 2-647.

In the instant case, the administrative law judge acknowledged that Dr. West was the miner’s treating physician. Nonetheless, based on his consideration of the criteria set forth at Section 725.104(d) and the Sixth Circuit’s decision in *Williams*, the administrative law judge found that Dr. West’s opinion was insufficient to establish that the miner’s death was due to pneumoconiosis. Decision and Order at 10. Further, as discussed, *supra*, the administrative law judge properly discredited Dr. West’s opinion because he found that it was not reasoned. *Clark*, 12 BLR at 1-155. Consequently, we reject claimant’s assertion that the administrative law judge should have given greater weight to Dr. West’s opinion because he was the miner’s treating physician. Thus, because the administrative law judge properly discounted Dr. West’s opinion, the only medical opinion 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.

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