

BRB No. 99-1059 BLA

ELIZABETH J. OWENS (Widow of and on behalf of ROY P. OWENS )	)	)
Claimant-Petitioner	)	)
KENTLAND-ELKHORN COAL CORPORATION	)	)
Employer-Respondent	)	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	)
Party-in-Interest	)	)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Lois Kitts (Baird, Baird, Baird & Jones), Pikeville, Kentucky, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (98-BLA-1225) of Administrative Law Judge Richard T. Stansell-Gamm on a survivor's claim and on a petition for modification of a miner'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).<sup>1</sup> The relevant procedural history of this case is as follows: The miner filed his application for benefits with the Department of Labor on November 15, 1979. Director's Exhibit 87. Following a

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<sup>1</sup>Claimant is Elizabeth J. Owens, surviving spouse of the miner, Roy R. Owens.

hearing, Administrative Law Judge Edward J. Murty, Jr., issued a Decision and Order denying benefits dated June 15, 1983. Judge Murty credited the miner with at least thirteen years of coal mine employment and considered the claim under 20 C.F.R. Part 727. Judge Murty determined that the miner did not establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(1)-(4). Accordingly, he denied benefits under 20 C.F.R. Part 727 and 20 C.F.R. Part 410, Subpart D. *Id.* The miner took no further action on this claim, but rather, filed a duplicate claim on August 10, 1994. Director's Exhibit 1.

Administrative Law Judge Edward Terhune Miller denied this duplicate claim in a Decision and Order dated September 20, 1996. Director's Exhibit 48. Judge Miller determined that the newly submitted evidence was sufficient to establish that the miner was totally disabled, but did not support a finding that the miner had pneumoconiosis or was totally disabled due to pneumoconiosis. Judge Miller concluded that the miner failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309(d) and denied benefits accordingly. *Id.*

The miner died on April 21, 1997.<sup>2</sup> Director's Exhibit 62. Claimant subsequently submitted additional evidence regarding the miner's claim, which was treated as a request for modification. Claimant also filed a survivor's claim on July 15, 1997, which was consolidated with the request for modification concerning the miner's claim. Director's Exhibit 57. The case was assigned to Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) for a hearing. In his Decision and Order, the administrative law judge considered all of the evidence of record and determined that it was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied with respect to the miner's claim and the survivor's claim.

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<sup>2</sup>Dr. Briggs prepared the death certificate and identified cardiopulmonary arrest due to coronary artery occlusion as the cause of death. Director's Exhibit 62. Dr. Briggs also identified coal workers' pneumoconiosis and aneurysm as significant conditions contributing to the miner's death. *Id.*

Claimant challenges the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(2) and (a)(4). Employer, in response, asserts that the administrative law judge's denial of benefits is supported by substantial evidence, and accordingly, urges affirmance of the Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.<sup>3</sup>

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in the miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's totally disabling respiratory impairment was due, at least in part, to his pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (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*,

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant is the eligible survivor of the miner and that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Brown, supra*.

Claimant challenges the administrative law judge's weighing of the evidence regarding the existence of pneumoconiosis under Section 718.202(a)(2) and (a)(4). Claimant states that the administrative law judge erred by failing to give appropriate weight to the original autopsy slide review by Dr. Abrenio, the autopsy prosector, and to the death certificate prepared by Dr. Briggs. Claimant also contends that it was error for the administrative law judge to give more weight to the opinions offered by non-examining physicians than to the opinion of Dr. Sutherland, the miner's treating physician.<sup>4</sup>

These contentions are without merit. With respect to Dr. Abrenio's diagnosis of pneumoconiosis based upon his microscopic examination of the miner's lung tissue, the administrative law judge acted within his discretion in determining that it was not as well-reasoned as the contrary opinions of Drs. Naeye, Caffrey, and Hutchins. The administrative law judge rationally found that Dr. Abrenio did not identify the size of the coal macules and macrophages that he observed and thus, unlike the reviewing pathologists, did not fully set forth the basis for his conclusions. Decision and Order at 17. The administrative law judge properly determined, therefore, that Dr. Abrenio's opinion was entitled to less weight than the opinions of Drs. Naeye, Caffrey, and Hutchins. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Perry, supra*. Regarding the death certificate wherein Dr. Briggs opined that coal workers' pneumoconiosis was a significant contributing factor in

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<sup>4</sup>Claimant also contends that the administrative law judge failed to consider the report of Dr. Robinette. Although the administrative law judge did not mention Dr. Robinette by name, he considered the hospital records that Dr. Robinette prepared and rationally found that the physician's diagnosis of pneumoconiosis was based only on the miner's history. Decision and Order at 20; Director's Exhibit 78.

the miner's death, the administrative law judge acted within his discretion in finding that it was insufficient to establish the existence of pneumoconiosis, as Dr. Briggs failed to identify the information upon which he based his conclusion. See *Smith v. Camco Mining Co.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

With respect to the administrative law judge's treatment of the non-examining physicians' opinions, although the United States Court of Appeals for the Sixth Circuit has indicated that a treating physician's opinion may be entitled to more weight than the report of a non-treating or non-examining physician, the court has also held that it is appropriate for an administrative law judge to accord diminished weight to a treating physician's opinion when it is not adequately reasoned or documented. See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Moreover, the court has not held that an administrative law judge is required to give less weight to the report of a non-treating or non-examining physician. In the present case, the administrative law judge rationally determined that the opinion of Dr. Sutherland, the miner's treating physician, was entitled to little weight on the ground that Dr. Sutherland did not identify the documentation upon which he relied in diagnosing pneumoconiosis. Decision and Order at 16; Director's Exhibit 86; see *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*. Thus, the administrative law judge did not err in finding that the opinions of the physicians who did not examine or treat claimant were entitled to greater relative weight than the opinion of the miner's treating physician. See *Griffith, supra*.

The remainder of claimant's Petition for Review and Brief consists of a recitation of the medical evidence that supports a finding that the miner had pneumoconiosis and that pneumoconiosis was a contributing cause of his death. Inasmuch as claimant has failed to allege any additional specific factual or legal errors in the administrative law judge's determination that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), we must affirm the administrative law judge's finding. See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). As this finding precludes entitlement pursuant to 20 C.F.R. Part 718 in the miner's claim and in the survivor's claim, we must also affirm the denial of benefits in both claims.<sup>5</sup> See *Brown, supra*; *Trumbo, supra*.

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<sup>5</sup>Inasmuch as we have affirmed the administrative law judge's findings on the merits under 20 C.F.R. §718.202(a)(1)-(4), error, if any, in the omission of an analysis of the request for modification of the miner's denied duplicate claim

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pursuant to 20 C.F.R. §725.310(a) is harmless. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge