BRB No. 99-0328 BLA

WANDA S. HENSLEY (Widow of MILLARD HENSLEY) Claimant-Petitioner v. WELLMORE COAL CORPORATION and UNITED AFFILIATES CORPORATION Employers-Respondents 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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Miller Kent Carter (Branham & Carter), Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (97-BLA-1231) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a miner's and 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 credited the miner with thirty-five years of qualifying coal mine employment and found that claimant is a qualifying survivor of the miner. The administrative law judge determined that claimant's survivor's claim also constitutes a request for modification of the denial of the miner's claim and that claimant established the existence of pneumoconiosis and, consequently, a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge then considered the merits of the miner's claim and found that the miner established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b) and total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge then considered the survivor's claim and found that claimant established that the miner had pneumoconiosis which arose out of his coal mine employment pursuant to Sections 718.202(a)(2) and 718.203(b), but failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, benefits were denied on both the miner's and the survivor's claims. On appeal, claimant initially contends that the administrative law judge erred in applying the law of the United States Court of Appeals for the Fourth Circuit when considering the miner's and survivor's claims because the claims arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Claimant also challenges the administrative law judge's findings pursuant to Section 718.204(b) and 718.205(c)(2) contending that they are not supported by substantial evidence in light of the holdings of the Sixth Circuit. Employer, in response, initially argues that the administrative law judge erred in finding that the filing of claimant's survivor's claim constituted a request for modification of the miner's claim and in finding that

[1]Claimant is Wanda S. Hensley, the miner's widow. The miner, Millard Hensley, filed claims for benefits on July 3, 1990 and July 25, 1990, which were denied in a Decision and Order issued by Administrative Law Judge David DiNardi on October 13, 1993 because the miner failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant 20 C.F.R. §§718.202(a) and 718.204(c). Director's Exhibit 31. The miner filed another claim for benefits on December 19, 1995, however, the miner died on April 23, 1996. Director's Exhibits 10, 32. The district director denied this claim on May 17, 1996 and no further action was taken on this claim. Director's Exhibit 32. Claimant filed the instant claim on August 8, 1996. Director's Exhibit 1.

claimant is an eligible survivor of the miner. Employer however agrees that the claim arises within the jurisdiction of the Sixth Circuit, but urges affirmance of the denial of benefits on both claims. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant initially contends that, because this claim arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge erred in applying the holding of the United States Court of Appeals for the Fourth Circuit in *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir.1990) in considering the miner's claim pursuant to Section 718.204(b), because the Sixth Circuit's standard for determining disability causation, which is met when claimant establishes that his totally disabling respiratory impairment was due at least in part to pneumoconiosis, is more favorable to claimant. Claimant's Brief at 2-7. While the administrative law judge did not make a specific finding that the claim arose within the jurisdiction of the Fourth Circuit, he cited standards established by the Fourth Circuit in his Decision and Order. Specifically, pursuant to Section 718.204(b), the administrative law judge, citing *Robinson*, stated that the miner must establish that his pneumoconiosis was a contributing cause to his disability but that, if the miner would have been disabled to the same degree and by the same time in his life if he had never been a miner, benefits should be denied. Decision and Order at 12.

As claimant states, the Sixth Circuit, in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), held that in order to establish total disability due to pneumoconiosis claimant need only show that his total disability was due "at least in part" to his pneumoconiosis. *See Jonida Coal Co. v. Hunt,* 124 F.3d 739, 21 BLR 2-

[2]We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment and pursuant to 20 C.F.R. §§725.310, 718.202(a), 718.203(b) and 718.204(c) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

203 (6th Cir. 1997); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams, supra.* As stated above, the Fourth Circuit, in *Robinson*, held that in order to establish total disability due to pneumoconiosis claimant need show only that his pneumoconiosis was a contributing cause to his total disability. *Robinson, supra.* While the two standards contain different language, claimant has not shown how the burden placed upon claimant varies between the two jurisdictions. Further, it is not apparent from the language of the two standards that one is more stringent than the other. Thus, because claimant has not established that the Sixth Circuit's standard is more favorable than the Fourth Circuit's standard, we hold that the administrative law judge's failure to apply the Sixth Circuit's standard for disability causation at Section 718.204(b) is harmless error. Moreover, as there is no other challenge to this finding, we affirm the administrative law judge's determination that the miner failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Turning to the survivor's claim, claimant contends that the administrative law judge erred in rejecting the opinions of Dr. Page, the treating physician, and Dr. Dennis, the physician who performed the autopsy. Claimant's Brief at 7. In November, 1996, Dr. Page responded to questions sent to him by the Department of Labor regarding the miner's condition. Director's Exhibit 14. In response to the question of whether pneumoconiosis hastened the miner's death, Dr. Page stated "I feel pneumoconiosis hastened his death." *Id.* In response to the question of whether pneumoconiosis contributed to his respiratory impairment and hastened his death, Dr. Page stated "yes." *Id.* In a letter dated December 31, 1997, Dr. Page simply stated that the miner had coal workers' pneumoconiosis and that his death was accelerated by the condition of pneumoconiosis. Claimant's Exhibit 1. Claimant contends that the administrative law judge erred in failing to assign the greatest weight to Dr. Page's opinion because of his status as the miner's treating physician. Claimant's Brief at 7. While the administrative law judge may assign greater weight to the opinion of the treating physician, the administrative law judge acted within his discretion, in this instance, in assigning Dr. Page's opinions no weight because they contain conclusory statements with "absolutely no support or explanation." Decision and Order at 21; Claimant's Exhibit 1; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989)*; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985).

Based on an inquiry from the Department of Labor dated November 6, 1996, Dr. Dennis submitted a report in which he checked a box indicating that the miner had a respiratory impairment related to his coal mine employment which hastened

his death and the doctor referenced his autopsy report.[3] Director's Exhibit 15. The administrative law judge acted within his discretion in finding this opinion insufficient to carry claimant's burden because it is conclusory and poorly reasoned. Decision and Order at 21; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In a letter dated December 30, 1997, Dr. Dennis stated that the "black dust certainly hastened and accelerated the process because of the resultant fibrosis that was noted in the interstitial and also pleuritic, both viscera and parietal distribution." Claimant's Exhibit 1. The administrative law judge found Dr. Dennis's later opinion to be of some probative value but acted within his discretion in finding that this opinion "lacks any medical reasoning which would provide [him] an adequate basis upon which to credit [it] over the substantial contrary, and equally probative medical evidence" on the issue of the cause of the miner's death. Decision and Order at 21; Claimant's Exhibit 1; *Clark, supra*; *Lafferty, supra.* The administrative law judge then rationally concluded that the preponderance of the medical opinion evidence, which consists of the opinions of Drs. Hutchins, Kleinerman, Broudy and Fino, fails to establish that the miner's death was hastened by his pneumoconiosis pursuant to Section 718.205(c)(2). Decision and Order at 21; *Brown, supra; Lafferty, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Consequently, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2).

Claimant also contends that the administrative law judge erred in applying the standard established by the Fourth Circuit for determining death due to pneumoconiosis pursuant to Section 718.205(c). Claimant's brief at 5. Specifically, claimant contends that the administrative law judge erred in failing to apply the Sixth Circuit's holding in *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-

[3]In his autopsy report, Dr. Dennis opined that the miner died as a result of an acute process known as "pneumomediastinum, moderate to marked." Director's Exhibits 12, 15. He further opined that the miner had anthracosilicosis with fibrosis but more specifically emphysema which was panlobular including pulmonary congestion and edema and acute pneumonia with necrosis and also pulmonary emboli. *Id.* Dr. Dennis further stated that the black pigment deposition was mild to marked and pulmonary fibrosis of the interstitial variety was also noted. *Id*.

135 (6th Cir. 1993), which states that pneumoconiosis is a substantially contributing cause or factor leading to a miner's death if it serves to hasten that death in any way. *Id.* However, because the standard established by the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), which the administrative law judge applied, is exactly the same as the standard in *Brown*, we hold that the administrative law judge's reliance on *Shuff* is harmless error. *Larioni, supra.*

In its response brief, employer argues that the district director and the administrative law judge erred in treating the survivor's claim as a request for modification of the denial of the miner's claim and in finding that claimant is an eligible survivor of the miner. Employer's Brief at 5-6. Regarding employer's argument that the survivor's claim should not be treated as a request for modification, the record reflects that the miner's claim was denied on May 17, 1996 and claimant filed the survivor's claim, with new evidence, on August 8, 1996. Director's Exhibits 1, 32. The administrative law judge properly found that the survivor's claim could also be construed as a request for modification of the miner's claim as claimant submitted probative evidence of the miner's condition within one year of the prior denial of the miner's claim. Decision and Order at 5; 20 C.F.R. 725.310(a); *Kubachka v. Windsor Power Coal Co.*, 11 BLR 1-171 (1988). As a result, we affirm the administrative law judge's treatment of claimant's survivor's claim as a request for modification of the miner's claim pursuant to Section 725.310.

Employer next argues that, because there is no evidence in the record that the miner contributed to claimant's support, except for her hearing testimony, claimant has not established that she is an eligible survivor of the miner. Employer's Brief at 6. In making his finding that the miner made regular contributions to claimant which exceeded one-half of her monthly expenses, the administrative law judge acted within his discretion in crediting claimant's uncontradicted hearing testimony that the miner paid all of her bills from the date of their 1994 divorce until his death in 1996 and in noting that she indicated that the miner provided her full support at the time of his death on her application for benefits. Decision and Order at 5; Hearing Transcript at 13, 28-29; Director's Exhibit 1; 20 C.F.R. §725.217; *Lafferty, supra; see also McCoy v. Director, OWCP*, 7 BLR 1-789 (1985). Consequently, we affirm the administrative law judge's finding that claimant is an eligible survivor.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge