BRB Nos. 99-0262 BLA
and 99-0262 BLA-A

JEAN SHUMAKER (Widow of GEORGE R. SHUMAKER)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld and Schiller), Pittsburgh, Pennsylvania, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand (96-BLA-1532) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a

miner's claim and awarding benefits 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).[1] This is the second time this case is before the Board. By Decision and Order of March 27, 1998, the Board affirmed the administrative law judge's findings under 20 C.F.R. §§718.202(a)(3), 718.204(c)(3), and 718.204(c)(1), but vacated and remanded the case for further consideration of the evidence under 20 C.F.R. §§718.202(a)(1), (a)(2) and (a)(4), 718.204(b), (c) and 718.205(c)(2). *Shumaker v. Peabody Coal Co.*, BRB No. 97-0896 BLA, (Mar. 27, 1998)(unpublished). On remand, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b), and total disability pursuant to Section 718.204(c). However, the administrative law judge found that claimant did not establish total disability due to pneumoconiosis pursuant to Section 718.204(b). With respect to the survivor's claim, the administrative law judge found that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge denied benefits on the miner's claim and awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's findings under Sections 718.202(a)(1) and 718.205(c). Claimant responds, urging the Board to affirm the administrative law judge's finding under Section 718.202(a) and his decision to award survivor's benefits pursuant to Section 718.205(c)(2). Additionally, in her cross-appeal, claimant challenges the administrative law judge's finding, in the miner's claim, that the evidence did not establish total disability due to pneumoconiosis pursuant to Section 718.204(b). Employer replies, reiterating his arguments requesting the Board to vacate the administrative law judge's findings under Sections 718.202(a) and 718.205(c). The Director, Office of Workers' Compensation Programs, has declined to file a brief on appeal.[2]

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[1]The miner's claim, filed on May 3, 1994, was pending when he died on June 8, 1995. Director's Exhibits 1, 34. Claimant filed a claim for survivor's benefits on July 6, 1995. Director's Exhibit 35.

[2]We affirm as unchallenged on appeal the administrative law judge's finding under 20 C.F.R. §718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R Part 718 in a living miner's claim, a claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718,202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In order to establish entitlement to survivor's benefits under Part 718, in a claim filed 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 suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see 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). The administrative law judge correctly noted that the requirements of Section 718.205(c) are satisfied if claimant proves that pneumoconiosis hastened the miner's death in any way. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); Decision and Order at 22.

In challenging the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(1), employer first argues, citing the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), that the administrative law judge erred in not considering the x-ray evidence in conjunction with the biopsy evidence and the physicians' reports. We disagree. We decline to apply the Third Circuit's decision in *Williams* in the instant case since this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has not adopted the holding in *Williams* that all of the conflicting evidence under Section 718.202(a)(1)-(4) must be weighed together.[3] In order to maintain as much consistency in our decisions as possible, we will continue to hold in cases arising within the Sixth Circuit that the methods by which claimant may establish the

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

existence of pneumoconiosis under Section 718.202(a)(1)-(4) are alternate methods. *See* 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Employer further contends that the administrative law judge erred by giving preference to Dr. Gaziano's May 19, 1994 positive x-ray reading as the "latest evidence." Employer argues that the administrative law judge did not consider Dr. Grodner's subsequent negative reading of the x-ray taken on December 12, 1994, ignored Dr. Rosenberg's statement that the irregular opacities of 1/0 profusion in the mid and lower lung fields are inconsistent with pneumoconiosis, and mischaracterized the interpretations of Dr. Safko of the x-ray taken on May 6, 1995 and of Dr. Grober of the x-ray taken on May 18, 1995. We uphold the administrative law judge's ultimate decision to rely on Dr. Gaziano's positive interpretation based on his qualifications as a B reader. Decision and Order at 4, 13-14; *see* 20 C.F.R. §718.102; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Contrary to employer's assertion, the administrative law judge did not rely solely on Dr. Gaziano's positive interpretation because it was the "latest" x-ray interpretation of record. Rather, he properly accorded Dr. Gaziano's interpretation "most" weight because of his qualifications as a B reader. *Id*. In contrast, the qualifications of the other readers of record, including Drs. Grodner, Rosenberg, Grober and Safko, are not in the record.[4] Because the administrative law judge rationally relied on the positive interpretation of Dr. Gaziano, a B reader, any error in not considering subsequent negative interpretation by physicians without special qualifications is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

[4]The administrative law judge permissibly gave less weight to the May 6, 1995 and May 18, 1995 x-ray interpretations because they were not classified pursuant to 20 C.F.R. §718.102. 20 C.F.R. §718.102; Decision and Order at 13.

On cross-appeal regarding the miner's claim, claimant argues that the administrative law judge erred in according the most weight to Dr. Rosenberg's opinion that the miner's disability was due to cigarette smoking, and in rejecting the opinions of Drs. Haggenjos, Knight, Schowengerdt and Grodner. Claimant's argument that the administrative law judge erred in rejecting Dr. Knight's opinion because he did not state the cause of the miner's disability has merit. The administrative law judge found that Dr. Knight diagnosed severe chronic obstructive pulmonary disease and bronchopneumonia, but did not specifically state the cause of the miner's respiratory impairment.[5] Decision and Order at 17. The administrative law judge omitted Dr. Knight's indications that coal mine employment was the primary cause of the miner's chronic obstructive pulmonary disease and "respiratory distress," and that the miner's "pulmonary functions are showing sufficient impairment to be disabling from his usual types of coal mining employment." Director's Exhibit 11. The administrative law judge's finding that Dr. Knight did not state the cause of the miner's disability is thus contrary to the record. We, therefore, vacate the administrative law judge's finding and remand the case for the administrative law judge to reconsider all the medical opinion evidence under Section 718.204(b).

With respect to the survivor's claim, employer argues that the administrative law judge erred in discrediting Dr. Rosenberg's opinion that the miner's death was neither due to nor significantly aggravated by pneumoconiosis. Employer asserts that the administrative law judge was inconsistent in crediting Dr. Haggenjos' opinion over Dr. Rosenberg's, when he previously determined that Dr. Rosenberg's report "is entitled to more weight as it is well-reasoned and well-documented, not to mention that he is the only physician who made complete findings regarding pneumoconiosis, total disability, causation of the totally disabling respiratory impairment, and death due to pneumoconiosis." Decision and Order at 17. Employer also argues that the administrative law judge gave more weight to Dr. Haggenjos opinion only because he was the miner's treating physician.

[5]The administrative law judge noted that Dr. Knight "did comment that the primary cause of [the] miner's chronic obstructive pulmonary disease was coal mining and that a minor aggravating factor could have been [the] miner's thirty year smoking history..." Decision and Order at 17. The administrative law judge found that this comment goes to the cause of the miner's respiratory condition and not to the cause of the miner's total disability. Decision and Order at 11.

We disagree with employer's contentions. The administrative law judge first determined that Dr. Haggenjos supported his finding that the miner's death was complicated by pneumoconiosis by stating that the miner's "pneumoconiosis severely limited his ability to aerate his vital organs (*i.e*. heart)." Decision and Order at 23; Director's Exhibit 46. The administrative law judge then permissibly gave Dr. Haggenjos' opinion most weight as he was the miner's treating physician. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Further, the administrative law judge permissibly gave Dr. Rosenberg's opinion less weight because he did not consider whether the miner's death "was even remotely hastened by pneumoconiosis as Dr. Haggenjos did by finding that pneumoconiosis compromised miner's remaining lung function." Decision and Order at 23. Dr. Rosenberg found the evidence insufficient to diagnose pneumoconiosis or any other dust disease arising out of coal mine employment. Employer's Exhibit 1. Based on the foregoing, we affirm the administrative law judge's finding that claimant established that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c)(2). *See Griffith, supra*. We, therefore, affirm the administrative law judge's award of benefits in the survivor's claim.

Finally, employer alleges, referring to administrative law judge's Decision and Order at 24, that the administrative law judge was biased. Contrary to employer's assertion, the administrative law judge merely attempted to explain in layman's terms why benefits were not awarded in the miner's claim. We reject employer's request that this case be reassigned to another administrative law judge because the record does not support employer's allegation of bias. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order awarding benefits on the survivor's claim is affirmed and his Decision and Order denying benefits on the miner's claim is affirmed in part and vacated in part, and the case is remanded for further consideration of the miner's claim consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge