BRB No. 02-0268 BLA

PATRICIA HOUSLEY (Widow of ROBERT W. HOUSLEY)	)	
Claimant-Petitioner	)	
v.	)	
LIMOSINE COAL COMPANY, INCORPORATED #3	)	DATE ISSUED:
and	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-0977) of Administrative Law

[1]Claimant is the widow of the miner, Robert W. Housley, who died on October 27,

Judge Thomas F. Phalen, Jr., denying benefits on a 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).[2] The administrative law judge credited the miner with at least twenty-two years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). However, the administrative law judge found the evidence insufficient to 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 is insufficient to establish that the miner's death was due to pneumoconiosis at 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.[3]

1997. Director's Exhibits 1, 8. The miner filed a claim on February 22, 1993. Director's Exhibit 55. This claim was denied by the Department of Labor on August 4, 1993. *Id*. The record does not indicate that the miner pursued this claim any further. Claimant filed a survivor's claim in April 1999. Director's Exhibit 1.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Since the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a) and 718.203(b) are not challenged on appeal, we affirm

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).

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these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[4] *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Boyd, supra*.

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[4]Section 718.205(c) provides, in pertinent part, 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.
> ...
> (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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). We disagree. The administrative law judge stated that "Drs. Dalloul, Dahhan, Castle, and Crouch rendered opinions regarding the cause of [the miner's] death." Decision and Order at 18. Whereas Dr. Dalloul opined that pneumoconiosis contributed to the miner's death, Director's Exhibits 22, 39, 45, Drs. Castle, Crouch and Dahhan opined that pneumoconiosis did not contribute to the miner's death, Director's Exhibits 23, 43-45.[5] The administrative law judge concluded, "[v]iewing all of the evidence together, I find that the opinions of the four most qualified physicians regarding the cause of the miner's death is (sic) in equipoise, and that therefore, [c]laimant has failed to establish, by a preponderance of the evidence, that [the miner's] death was due to pneumoconiosis." Decision and Order at 19.

On appeal, claimant only asserts that the administrative law judge should have given dispositive weight to the opinion of Dr. Dalloul based upon Dr. Dalloul's status as the miner's treating physician. This case arises within the jurisdiction of the United States Court

[5]The record also contains a death certificate signed by Dr. Bari and the opinion of Dr. Younes that pneumoconiosis did not contribute to the miner's death. Director's Exhibits 8, 46. The administrative law judge did not accord weight to this evidence. In the death certificate, Dr. Bari indicated that respiratory failure and extensive stage small cell lung cancer were the causes of the miner's death. Director's Exhibit 8. The administrative law judge, however, stated that "it is unclear who completed the [death certificate] form as the doctor's signature is illegible." Decision and Order at 10. Although employer refers to Dr. Bari's examination of the miner prior to the miner's death, employer does not assert that Dr. Bari signed the death certificate. Employer's Response Brief at 2. Since the death certificate supports the administrative law judge's finding that pneumoconiosis did not contribute to the miner's death, we hold that any error by the administrative law judge in failing to consider the death certificate at 20 C.F.R. §718.205(c) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). With regard to Dr. Younes's opinion, the administrative law judge noted that "[t]he record contains a single sheet of paper with a typed question asking for someone's opinion regarding whether or not [the miner's] CWP played a significant or substantial role or hastened his death in any way." Decision and Order at 11, 12. The administrative law judge stated that "[t]here are no documents accompanying Dr. Younes'[s] opinion, nor does he note what information he reviewed in reaching his conclusion." Decision and Order at 12. Thus, the administrative law judge properly discredited Dr. Younes's opinion because it is not reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

of Appeals for the Sixth Circuit. While the Sixth Circuit has held that the opinions of treating physicians should be given their proper deference, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the court has also held that there is no requirement that administrative law judges give conclusive weight to the opinions of treating physicians, *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], F.3d , 2002 WL 1769283 (6th Cir. Aug. 2, 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In *Stephens*, employer argued that the administrative law judge's opinion reflected an "automatic preference" for the opinion of the treating physician. In rejecting employer's argument, the Sixth Circuit declared that a "treating physician presumption" does not exist, and that it never mandated that controlling weight be accorded to the opinions of treating physicians automatically. Rather, the Sixth Circuit noted that it merely held, in *Tussey*, that a treating physician's opinion should be given its proper deference. Further, the Sixth Circuit observed that its post-*Tussey* holdings make it clear that there is no requirement that the opinions of treating physicians be given controlling or conclusive weight.

In the instant case, the administrative law judge noted that "Dr...Dalloul, who is [B]oard certified in internal medicine and cardiovascular disease, was [the miner's] treating physician." Decision and Order at 10. The administrative law judge also noted that "[t]he record contains many office notes related to Dr. Dalloul's treatment of [the miner]." *Id*. The administrative law judge therefore stated, "I find that Dr. Dalloul's opinion is well reasoned and documented and entitled to *great* weight considering his qualifications and his familiarity with [the miner's] conditions." *Id*. at 18 (emphasis added).

However, the administrative law judge additionally found that the opinions of Dr. Castle, Crouch and Dahhan are well reasoned and documented, and thus, he found that they are also entitled to weight.[6] *Id*. at 18-19. Based upon the administrative law judge's weighing of the opinions of Drs. Castle, Crouch, Dahhan and Dalloul, the administrative law judge determined that the doctors' opinions are in equipoise. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we reject claimant's assertion that the administrative law judge should have given dispositive weight to the opinion of Dr. Dalloul based upon Dr. Dalloul's status as the miner's treating physician.[7]

[6]Drs. Castle and Dahhan are Board-certified in internal medicine and pulmonary disease, Director's Exhibits 23, 44, and Dr. Crouch is Board-certified in anatomical pathology, Director's Exhibit 43.

[7]The revised regulation at 20 C.F.R. §718.104(d)(5) provides that "[i]n appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's

Further, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trumbo, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

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opinion *controlling* weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5) (emphasis added). The revised regulation at 20 C.F.R. §718.104(d)(5) does not apply to the instant claim because it was filed before January 19, 2001.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge