BRB Nos. 02-0763 BLA
and 02-0763 BLA/A

EDITH M. RICHARDSON (Widow of WILLIAM RICHARDSON)	)	
Claimant-Petitioner/ Cross-Respondent	)	
v.	)	
ONTON DOCK, INCORPORATED	)	
and	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	DATE ISSUED: 08/25/2003
Employer/Carrier-Respondent Cross-Petitioner	)	
THOROUGHFARE COAL CORPORATION	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
Employer/Carrier-Respondent Cross-Respondent	)	
OWL CREEK COAL COMPANY, INCORPORATED	)	
and	)	
BITUMINOUS CASUALTY	)	

CORPORATION	)	
	)	
Employer/Carrier-Respondent Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order B Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Dick Adams (Adams Law Firm), Madisonville, Kentucky, for claimant.

Philip J. Reverman, Jr. (Boehl, Stopher & Graves, LLP), Louisville, Kentucky, for Onton Dock, Incorporated.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for Thoroughfare Coal Company and Owl Creek Coal Company.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, the miner=s widow,
[1] appeals, the Decision and Order B Denial of Benefits (00-BLA-0960) of Administrative Law Judge Robert L. Hillyard on a survivor=s claim

[1] The miner=s death certificate indicates that he died on December 15, 1997 due to a cardiac arrhythmia due to pneumonia. The death certificate lists the following as other significant conditions that contributed to death but did not result in the underlying causes of

[2] 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).

[3] The administrative law judge found that claimant established forty-six years of coal mine employment, and that Onton Dock, Incorporated (Onton Dock) is the responsible operator. The administrative law judge thus dismissed Thoroughfare Coal Company and Owl Creek Coal Company from the case. Considering the claim on its merits under 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R ' 718.202(a)(1)-(4). The administrative law judge also found that assuming, *arguendo*, that the evidence established the existence of pneumoconiosis, the evidence is insufficient to establish death due to pneumoconiosis at 20 C.F.R. ' 718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to accord Asuperior or presumptive weight@ to the opinion of the miner=s treating physician, Dr. Leigh. Claimant=s Brief at 2. Claimant thus urges the Board to remand the case to the administrative law judge for a reweighing of Dr. Leigh=s opinion. Onton Dock, responds in support of the administrative law judge=s denial of benefits. Thoroughfare Coal Company and Owl Creek Coal Company, also respond in support of the administrative law judge=s denial of benefits. The Director, Office of Workers= Compensation Programs (the Director), has not filed a brief in response to claimant=s appeal. Onton Dock has filed a cross-appeal, contending that the administrative law judge erred in finding that it is a Acoal mine operator@ within the meaning of the Act and regulations and is the proper responsible operator. Onton Dock urges the Board to dismiss it from the case and to designate either Thoroughfare Coal Company or Owl Creek Coal Company as the proper responsible operator. Thoroughfare Coal Company and Owl Creek Coal Company respond, urging the Board to affirm the administrative law judge=s designation of Onton Dock as the responsible operator. The Director also responds, contending that the administrative law judge properly found that Onton Dock is the responsible operator.
[4]

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death: chronic anemia, chronic renal failure and chronic obstructive pulmonary disease. Director=s Exhibit 8.

[2] Claimant filed this claim on May 15, 1998. Director=s Exhibit 1.

[3] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4] Inasmuch as no party challenges the administrative law judge=s findings pursuant to 20 C.F.R. ' 718.202(a)(1), (a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 by 30 U.S.C. ' 932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c).[5] *See* 20 C.F.R. ''718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner=s death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a

[5] 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 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 Asubstantially contributing cause@ of a miner=s death if it hastens the miner=s death.

20 C.F.R. '718.205(c).

substantially contributing cause or factor leading to the miner's death. 20 C.F.R. '718.205(c)(2). Pneumoconiosis is a Asubstantially 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); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

In order to establish entitlement to benefits in a survivor=s claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. ''718.201, 718.202, 718.203, 718.205(c); 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). Under 20 C.F.R. '718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death. Pursuant to the revised regulation at 20 C.F.R. '718.205(c)(5), pneumoconiosis is a Asubstantially contributing cause@ of a miner=s death if it hastens the miner=s death. 20 C.F.R. '718.205(c)(5).

Claimant contends that it was error for the administrative law judge not to accord Asuperior or presumptive weight,@ Claimant=s Brief at 2, to the opinion of the miner=s treating physician, Dr. Leigh, that the miner had pneumoconiosis and Adied of what was felt to be a probable cardiac arrhythmia most probably secondary to hypoxia from the pneumoconiosis disease.@ Director=s Exhibit 28. The administrative law judge recognized Dr. Leigh=s status as claimant=s treating physician. Decision and Order at 21, 26. Considering Dr. Leigh=s opinion with regard to the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4), the administrative law judge noted Dr. Leigh=s testimony that she did not ever actually make a diagnosis of pneumoconiosis herself, but that the miner Adid have all the findings that you would see on a chest x-ray that would fit that diagnosis... [t]hinning of the lung tissue with emphysematous changes, flattening of the diaphragm like you see where lungs increase their volume because of obelial or pockets in the lung.@ Director=s Exhibit 31 at 14, 16-17. The administrative law judge found that Dr. Leigh relied on positive x-ray readings to diagnose pneumoconiosis whereas the administrative law judge found that the weight of the x-ray evidence is negative for the disease. The administrative law judge found that while Dr. Leigh was the miner=s treating physician, her opinion was outweighed by the contrary opinions of four Ahighly qualified@ physicians, Drs. Fino, Rosenberg, Broudy, and Branscomb, which the administrative law judge found to be better reasoned, documented, and supported by the medical evidence. The administrative law judge further noted that Dr. Leigh=s treatment notes from May 25, 1997 through December 14, 1997 (the day before the miner died), as well as the miner=s death certificate completed by Dr. Leigh, do not mention pneumoconiosis. The administrative law judge thus found that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4).

In his consideration of whether the medical evidence was sufficient to establish that the

miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c), the administrative law judge weighed Dr. Leigh=s opinion that the miner Adied of what was felt to be a probable cardiac arrhythmia most probably secondary to hypoxia from the pneumoconiosis disease.@ Director=s Exhibit 28. The administrative law judge accorded Dr. Leigh=s opinion less weight because he found her opinion to be equivocal. The administrative further found that Dr. Leigh=s opinion was outweighed by the contrary medical opinions of Drs. Fino, Rosenberg, Broudy, and Branscomb, whom the administrative law judge found to be highly qualified Board-certified internists and pulmonologists. The administrative law judge, therefore, found that the medical evidence was insufficient evidence to establish that the miner=s death was due to pneumoconiosis at 20 C.F.R. ' 718.205(c). Decision and Order at 30.

Claimant, citing Tussey v. Island Creek Coal Co., 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), argues that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. Claimant asserts that while the administrative law judge acknowledged Dr. Leigh=s Aparticipation in [the miner=s] treatment,@ he erroneously found Dr. Leigh=s opinion Ato be entitled to less weight than [the medical opinions of] other doctors who saw [the miner] one time at the request of the insurance companies involved in the litigation.@ Claimant=s Brief at 2-3. Claimant urges the Board to vacate the administrative law judge=s findings and to remand the case to the administrative law judge to reconsider the medical opinions offered by Dr. Leigh and to afford them presumptive weight. Claimant=s Brief at 3.

We disagree with claimant=s contentions. The United States Court of Appeals for the Sixth Circuit recently held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams,* F.3d , 2003 WL 21756342 (6th Cir., July 31, 2003). The Sixth Circuit held that the opinions of treating physicians should get the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that administrative law judges must evaluate treating physicians just as they consider other experts. *Id.* In the instant case, the administrative law judge properly accorded less weight to Dr. Leigh=s opinion at 20 C.F.R. ' 718.202(a)(4) because Dr. Leigh testified that she never actually made a diagnosis of pneumoconiosis herself and that the x-ray evidence showed the existence of pneumoconiosis whereas the administrative law judge found that the weight of the x-ray evidence is negative for the disease, *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because Dr. Leigh did not mention pneumoconiosis in her treatment notes proceeding the miner=s death or in the miner=s death certificate. The administrative law judge further found that Dr. Leigh=s opinion was outweighed by the contrary opinions of

four Ahighly qualified@ physicians, Drs. Fino, Rosenberg, Broudy, and Branscomb,[6] which he found to be better reasoned, documented, and supported by the medical evidence of record. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge further properly found, at 20 C.F.R. ' 718.205(c), that Dr. Leigh=s opinion, that the miner Adied of what was felt to be a probable cardiac arrhythmia most probably secondary to hypoxia from the pneumoconiosis disease,@ Director=s Exhibit 28, was equivocal. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

Based on the foregoing, we hold that the administrative law judge=s weighing of the opinion of the miner=s treating physician, Dr. Leigh, is consistent with applicable case law, including *Williams*. Consequently, we reject claimant=s argument that the administrative law judge erred by finding that the opinion of Dr. Leigh, notwithstanding Dr. Leigh=s status as the miner=s treating physician, was outweighed by the consulting opinions of Drs. Fino, Rosenberg, Broudy, and Branscomb.

Moreover, we reject claimant=s contention that the administrative law judge erroneously credited the opinions of physicians who rendered their opinions Aat the request of the insurance companies involved in the litigation.@ Claimant=s Brief at 2-3. The identity of the party who hired a particular physician as an expert witness does not, by itself, demonstrate partiality or partisanship on the part of the physician. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992); *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Claimant specifies no other error on the part of the administrative law judge. We, therefore, affirm the administrative law judge=s finding that the medical opinion evidence of record, including Dr. Leigh=s opinion, fails to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(4). We also affirm the administrative law judge=s finding that the evidence of record, including Dr. Leigh=s opinion, is insufficient to establish that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c).

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[6] Substantial evidence supports the administrative law judge=s determination that Dr. Leigh is less qualified than Drs. Fino, Rosenberg, Broudy, and Branscomb. Dr. Leigh testified that she is a family practitioner, Director=s Exhibit 31 at 4, and that because she lacked special qualifications, she would defer to the opinion of a pulmonologist and/or radiologist to determine whether the miner had pneumoconiosis, what caused the miner=s chronic obstructive pulmonary disease, and what role pneumoconiosis played in the miner=s death, *Id.* at 13-18. The record establishes that Dr. Branscomb is Board-certified in Internal Medicine, Employer=s Exhibit 2, while Drs. Fino, Rosenberg, Broudy are each Board-certified in both Internal Medicine and Pulmonary Disease. Employer=s Exhibits 3, 4, 11.

In light of our affirmance of the administrative law judge=s findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)-(4) and insufficient to establish that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c), essential elements of entitlement, we affirm the administrative law judge=s denial of benefits under 20 C.F.R. Part 718. Consequently, we need not address Onton Dock=s contentions regarding the administrative law judge=s designation of Onton Dock as the responsible operator. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge