BRB Nos. 08-0800 BLA
and 08-801 BLA

D.G. (Widow of and on behalf of J.G.) Claimant-Petitioner v. RAINBOW VALLEY FUEL Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/28/2009 DECISION and ORDER

Appeal of the Decision and Order – Denying Living Miner's and Survivor's Benefits in Consolidated Claims of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Steven R. Armstrong (Casey, Bailey & Maines, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Living Miner's and Survivor's Benefits in Consolidated Claims (2007-BLA-05353 and 2007-BLA-05354) of Administrative Law Judge Joseph E. Kane rendered on a miner's subsequent claim and 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] The administrative law judge found that the miner had at least sixteen years of coal mine employment, as stipulated by the parties, and adjudicated both claims pursuant to 20 C.F.R. Part 718. With respect to the miner's subsequent claim, the administrative law judge found that the newly submitted evidence failed to establish either that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Thus, the administrative law judge found that claimant failed to demonstrate a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and denied benefits on the miner's subsequent claim. With respect to the survivor's claim, the administrative law judge initially noted that the evidence available for consideration was identical to the newly submitted evidence presented in the miner's claim. Thus, based on his determination in the miner's claim that the newly submitted evidence failed to establish that the miner had pneumoconiosis, the administrative law judge concluded that claimant was unable 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 the survivor's claim.

Claimant appeals, asserting that the administrative law judge erred by not finding that she established a change in an applicable condition of entitlement in the miner's claim, based on the opinions of Dr. Baker and Dr. Woolum, that the miner suffered from pneumoconiosis. Claimant contends that the administrative law judge erred by not applying the presumption at 20 C.F.R. §718.203(b). Claimant further asserts that the administrative law judge erred by not crediting Dr. Woolum's opinion that the miner was

[1] Claimant is the widow of J.G., the deceased miner. Director's Exhibit 67. The miner filed a previous application for benefits on May 16, 1980, which was denied by the district director on July 30, 1981, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner took no further action with regard to this claim. *Id*. The miner filed his subsequent claim on December 1, 2003. Director's Exhibit 5. The district director denied benefits on November 29, 2004, on the grounds that the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 38. The miner requested a hearing. Director's Exhibit 39. While the case was pending with the Office of Administrative Law Judges (OALJ), the miner died on May 3, 2005. Director's Exhibit 45. The miner's claim was returned to the district director for consolidation with claimant's survivor's claim, filed on April 7, 2006. Director's Exhibits 45, 47, 56. The district director denied benefits on the survivor's claim on October 27, 2006. Director's Exhibit 70. At claimant's request, the consolidated claims were returned to OALJ for a hearing, which was held on September 13, 2007. Director's Exhibit 72. The administrative law judge issued a Decision and Order denying benefits on June 30, 2008, which is the subject of this appeal.

totally disabled due to pneumoconiosis and that his death was hastened by pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has responded that he will not file a brief unless requested to do so by the Board.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Miner's Subsequent Claim

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, a miner must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, the miner's prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that employer is the responsible operator, his determination that the miner had at least sixteen years of coal mine employment, and his findings that claimant did not establish, based on the newly submitted evidence, the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 18. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

mine employment or that the miner was totally disabled by pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing one of the requisite elements of entitlement in order to have the administrative law judge review the miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3.

A. The existence of pneumoconiosis

The administrative law judge found that claimant was unable to establish a change in an applicable condition of entitlement because the newly submitted evidence failed to establish either the existence of pneumoconiosis or that the miner was totally disabled. Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in failing to credit the diagnoses of pneumoconiosis by Dr. Baker and Dr. Woolum, the miner's treating physician, as there are "no medical opinions or other evidence" to support a finding that the miner did not have pneumoconiosis." Claimant's assertion of error is rejected as it is without merit.

Dr. Baker examined the miner on September 30, 2004, at the request of the Department of Labor. Director's Exhibit 18. Dr. Baker obtained a chest x-ray which he read as negative for pneumoconiosis, 0/1, and an arterial blood gas study that was interpreted as normal. *Id*. There were no pulmonary function studies conducted. *Id*. On the Form CM-988, Dr. Baker diagnosed mild bronchitis by history, and when asked to provide the primary and secondary causes of that condition, Dr. Baker wrote: "? coal dust exposure/? rheumatoid arthritis." *Id*. In a one page addendum to Form CM-988, also dated September 30, 2004, Dr. Baker stated:

> [The miner] does have a chronic lung disease, which was caused by his coal mine employment. The diagnosis was based on legal pneumoconiosis. He does have mild bronchitis, not on a daily basis. . . . He also has severe rheumatoid arthritis. He may have mild underlying pulmonary fibrosis, which can cause cough and possibly sputum production. *So the rheumatoid arthritis may be the cause of his mild bronchitis, but coal dust exposure could definitely be a cause of his mild bronchitis.*
>
> Pulmonary function studies were not obtainable due to the miner's condition. Arterial blood gas studies were normal. *So he does have mild bronchitis and no other condition to account for bronchitis except his coal dust exposure.*
>
> Mild bronchitis is significantly contributed to or substantially aggravated by dust exposure in his coal mine employment.

Claimant's Exhibit 18 (emphasis added).

In weighing Dr. Baker's opinion at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that Dr. Baker read the chest x-ray taken in conjunction with his examination as negative for pneumoconiosis, "thus finding no clinical pneumoconiosis."[4] Decision and Order at 9. The administrative law judge also found that Dr. Baker's diagnosis of chronic bronchitis due to coal dust exposure was insufficiently reasoned to support a finding that the miner had legal pneumoconiosis,[5] and explained:

> Dr. Baker's opinion is equivocal and contradictory regarding causation, as he stated that the [m]iner's "rheumatoid arthritis may be the cause of his mild bronchitis," yet elsewhere stated that the [m]iner "has no other condition to account for bronchitis except coal dust exposure."

Decision and Order at 9.

Contrary to claimant's contention, the administrative law judge properly found that Dr. Baker read the miner's chest x-ray as negative for clinical pneumoconiosis. Decision and Order at 9; Claimant's Exhibit 18. Furthermore, although Dr. Baker diagnosed mild bronchitis, which could satisfy the definition of legal pneumoconiosis if it arose out of coal dust exposure, the administrative law judge reasonably found that Dr. Baker's opinion was equivocal as to whether the miner's respiratory condition was due to coal dust exposure or rheumatoid arthritis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we affirm the administrative law judge's conclusion that Dr. Baker did not provide a reasoned diagnosis of legal pneumoconiosis and that his opinion was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Clark*, 12 BLR at 1-155; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

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[4] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(1). This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id*.

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id*.

We also reject claimant's contention that the administrative law judge erred in failing to credit the opinion of the miner's treating physician, Dr. Woolum, as to whether the miner had pneumoconiosis. As noted by the administrative law judge, the record contains "several hundred pages of treatment notes," none of which reference pneumoconiosis. Director's Exhibits 59-61, 67. In a letter addressed "To Whom It May Concern," dated April 19, 2004, Dr. Woolum wrote that the miner "is now a bed ridden invalid with multiple problems including lungs/cardiac and severe rheumatoid and gouty arthritis." Director's Exhibit 67 at 30. Dr. Woolum advised that, based on these conditions, the miner would be "unable to undergo testing for black lung." *Id*. On May 17, 2004, Dr. Woolum wrote to claimant's counsel and stated:

> In regards to your letter of May 7, 2004, I wish I could answer your question. I have seen the miner only in the later states of his disease which have been related at first to a rectal abscess, mal nutrition [sic] and severe gouty rheumatoid arthritis. He certainly does have chronic obstructive airway disease which in itself, in my opinion, is disabling. However, for me to comment that this is pneumoconiosis, I would not be able to do so.

Id. at 29.

Dr. Woolum next completed a questionnaire dated March 27, 2006. Director's Exhibit 67 at 4. Dr. Woolum indicated that the miner had occupational lung disease that was caused by his coal mine employment and wrote as the basis for that diagnosis, "a pul funct" and "chest x-ray." *Id*. When asked on the questionnaire "if a chronic lung disease was diagnosed, was the condition causally related, in whole or in part, to the inhalation of coal mine dust[,]" Dr. Woolum wrote, "unknown." *Id*. Dr. Woolum was also asked whether his diagnosis of coal workers' pneumoconiosis was "based solely upon a chest x-ray interpretation [or] also upon treatment of the miner over a period of years[,]" to which he replied, "COPD many years." *Id*. Additionally, Dr. Woolum check-marked a box indicating that pneumoconiosis hastened the miner's death. *Id*.

In considering Dr. Woolum's opinion at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that while Dr. Woolum stated that he based his diagnosis of pneumoconiosis on "a pul funct" and "chest x-ray," the record does not contain a positive x-ray or pulmonary function study to support Dr. Woolum's opinion. Decision and Order at 9. The administrative law judge further noted that "in the absence of any explanation, it is unclear what documentation, if any, Dr. Woolum relied upon in diagnosing pneumoconiosis." *Id*. The administrative law judge also determined that Dr. Woolum's opinion was equivocal, since Dr. Woolum diagnosed pneumoconiosis, but also wrote "unknown" when asked on the questionnaire if the miner had a chronic lung disease that was caused in whole, or in part, by the inhalation of coal mine dust. *Id*. Thus, the administrative law judge found that Dr. Woolum's opinion was equivocal and

contradictory, and therefore, insufficient to satisfy claimant's burden of proving the existence of pneumoconiosis.

Claimant asserts that the administrative law judge abused his discretion in rejecting Dr. Woolum's opinion that the miner had an occupational disease caused by his coal mine employment. Claimant's Brief at 7-8. We disagree. As noted by the administrative law judge, Dr. Woolum stated in his May 17, 2004 letter that he could not comment on whether the miner had pneumoconiosis, but later reported in the March 27, 2006 questionnaire that the miner had an occupational disease due to coal dust exposure, citing an unidentified pulmonary function test and chest x-ray, as well as the miner's treatment for COPD. The administrative law judge properly found that Dr. Woolum did not provide any explanation or documentation to support his "willingness to attribute the [m]iner's COPD to pneumoconiosis [or coal dust exposure], when he previously stated that he could not." Decision and Order at 9. The administrative law judge also permissibly concluded that Dr. Woolum's opinion was equivocal and contradictory "because in another portion of [the March 27, 2006 questionnaire he wrote 'unknown' in response to the question, 'if a chronic lung disease was diagnosed, was that condition causally related, in whole or in part, to the inhalation of coal mine dust.'" Decision and Order at 9, *citing* Director's Exhibit 67 at 4; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7, 19 BLR 2-111, 2-117 (6th Cir. 1995). Thus we reject claimant's assertion that the administrative law judge erred in concluding that Dr. Woolum's opinion as to the existence of pneumoconiosis was equivocal and contradictory and lacked the necessary explanation and documentation to support claimant's burden of proof at Section 718.202(a)(4). *Id*.

Claimant also maintains that the administrative law judge erred in discrediting Dr. Woolum's opinion since he is the miner's treating physician and there are no contradicatory medical opinions stating that the miner did not have pneumoconiosis. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003). Rather, the Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id*. In this case, the administrative law judge took into consideration the factors set forth at 20 C.F.R. 718.104(d), but found that Dr. Woolum's opinion was "insufficiently reasoned to support an award of benefits" regardless of his relationship with the miner. Decision and Order at 9 n.6. Thus, contrary to claimant's assertion, because the administrative law judge acted within his discretion in finding that Dr. Woolum's opinion was neither adequately documented nor reasoned to support a finding of clinical or legal pneumoconiosis, he was not required to credit Dr. Woolum's

opinion, based solely on his status as claimant's treating physician.[6] *Williams*, 338 F.3d at 513; 22 BLR at 2-647; *Clark*, 12 BLR at 1-155. We therefore affirm , as supported by substantial evidence, the administrative law judge's credibility findings with regard to Dr. Woolum and his determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[7]

B. Total Disability

Claimant next argues that the administrative law judge erred in failing to find that she established a change in an applicable condition of entitlement by proving that the miner was totally disabled. Specifically, claimant asserts that the administrative law judge erred in weighing the medical opinions pursuant to 20 C.F.R. §718.202(b)(2)(iv). We disagree.

The administrative law judge correctly noted that Dr. Baker did not address whether the miner was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 11. In his May 17, 2004 correspondence, Dr. Woolum noted that the miner "does have chronic obstructive airway disease which in itself . . . is disabling." Director's Exhibit 67 at 29. The administrative law judge concluded that "in the absence of any explanation or documentation supporting [his conclusion], Dr. Woolum's opinion is insufficient to establish total respiratory disability." Decision and Order at 10-11.

Claimant contends that, contrary to the administrative law judge's finding, Dr. Woolum's May 17, 2004 opinion is supported by his "extensive examination and testing of [the miner], including x-rays and CT scans, and his prescribing of breathing medications, including eventually oxygen." Claimant's Brief at 11. Claimant also

[6] Claimant generally asserts that Dr. Woolum relied on numerous prior chest x-rays for his diagnosis of clinical pneumoconiosis. Claimant's Brief at 7. However, the administrative law judge correctly found that Dr. Woolum did not identify any specific x-ray to support his opinion. Decision and Order at 9. Moreover, the administrative law judge also correctly noted that none of the x-rays contained in the treatment records was read as positive for pneumoconiosis. Decision and Order at 6; Director's Exhibit 67.

[7] Because we have affirmed the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we reject claimant's assertion that she is entitled to the presumption at 20 C.F.R §718.203, that the miner's pneumoconiosis arose out of his coal mine employment. Claimant's Brief at 9-10.

asserts that Dr. Woolum's disability opinion is entitled to weight because he was the miner's treating physician. Claimant's Brief at 11-12.

The administrative law judge, however, reasonably found that Dr. Woolum's opinion was not sufficiently reasoned to support a finding of total disability since Dr. Woolum provided no explanation for his diagnosis of "disabling" chronic obstructive pulmonary disease. Decision and Order at 11; *Clark*, 12 BLR at 1-155. Consequently, the administrative law judge was not required to credit Dr. Woolum's diagnosis based solely on his status as the miner's treating physician. *See* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.2d at 513, 22 BLR at 2-647. We therefore affirm the administrative law judge's determination that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.202(b)(2)(iv).[8] *Id*.

Thus, because the administrative law judge properly found that claimant failed to establish either the existence of pneumoconiosis or total disability, we affirm his finding that claimant was unable to demonstrate a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. Consequently, we affirm the administrative law judge's denial of benefits on the miner's subsequent claim.

II. The Survivor's Claim

In order to be entitled to survivor's benefits, a claimant must demonstrate by a preponderance of the evidence that the deceased miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Griffith*, 49 F.3d at 186, 19 BLR at 2-116; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

[8] Because we affirm the administrative law judge's determination that the miner was not totally disabled, it is not necessary that we address claimant's assertion that the administrative law judge erred in failing to credit Dr. Woolum's opinion relevant to the issue of disability causation pursuant to 20 C.F.R. §718.204(c).

Claimant contends that the administrative law judge erred in failing to credit Dr. Woolum's opinion that the miner's death was hastened by pneumoconiosis.[9] We disagree. The administrative law judge correctly noted that "the evidence available for consideration in the survivor's claim is identical to the newly submitted evidence in the living miner's claim" and permissibly incorporated his credibility findings with respect to that evidence in his consideration of the survivor's claim. Decision and Order at 12. Thus, because the administrative law judge determined that the evidence in both the miner's claim and the survivor's claim failed to establish the existence of pneumoconiosis, he properly found that claimant was unable to show that pneumoconiosis caused, substantially contributed to, or hastened, the miner's death pursuant to 20 C.F.R. §718.205(c). We therefore affirm, as supported by substantial evidence, the administrative law judge's denial of benefits in the survivor's claim. *See* 20 C.F.R. §718.205(c); *Trumbo*, 17 BLR at 1-88-89 and n 4.

[9] Dr. Woolum completed the death certificate and listed the causes of the miner's death as "respiratory failure, sepsis, and severe rheumatoid arthritis." Director's Exhibit 67 at 3. Dr. Woolum also indicated on the March 27, 2006 questionnaire that the miner's death was hastened by pneumoconiosis. *Id*. at 4.

Accordingly, the Decision and Order – Denying Living Miner's and Survivor's Benefits in Consolidated Claims of the administrative law judge 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