BRB Nos. 00-0301 BLA
and 00-0301 BLA-A

DEBRA ANN FULLER (Widow of ELMER FULLER) Claimant-Petitioner Cross-Respondent v. CLINCHFIELD COAL COMPANY Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeals of the Decision and Order After Remand – Benefits Denied of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Daniel Sachs, Springfield, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order After

[1]Claimant is the surviving spouse of the miner, who died on July 10, 1994. Director's Exhibit 3. The miner's death certificate, signed by Dr. Hixson, indicates that the immediate cause of the miner's death was respiratory arrest. *Id*. The death certificate also lists

Remand – Benefits Denied (96-BLA-1310) of Administrative Law Judge Frederick D. Neusner 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). Claimant filed the instant survivor's claim on August 11, 1984. In an initial Decision and Order dated April 23, 1997, the administrative law judge credited the miner with more than twenty years of coal mine employment, and considered the claim under the applicable regulations at 20 C.F.R. Part 718. 1997 Decision and Order at 2. The administrative law judge determined that the parties stipulated that the miner suffered from pneumoconiosis within the meaning of the Act and regulations, and that a causal relationship existed between the miner's coal mine employment and pneumoconiosis. *Id*. at 9. The administrative law judge then found that the medical opinion of Dr. Turner, indicating that pneumoconiosis contributed significantly to the miner's death, was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). *Id*. at 12. The administrative law judge concluded that the contrary opinions of employer's experts, indicating that the miner's pneumoconiosis was too mild to have caused significant impairment or to have contributed to his death, were less persuasive because he found them to be contradictory to employer's stipulation that the miner had pneumoconiosis as defined by the Act and regulations; *i.e.*, a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments. Id*. Consequently, the administrative law judge awarded benefits. Employer appealed. The Board rejected employer's contention that it had not stipulated to the existence of pneumoconiosis arising out of coal mine employment. *Fuller v. Clinchfield Coal Co.*, BRB No. 97-1204 BLA (May 5, 1998)(unpublished). In addition, the Board affirmed the administrative law judge's finding that Dr. Turner's medical opinion was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) and, consequently, affirmed the award of benefits. *Id*.

Employer appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The Fourth Circuit vacated the award of benefits, and remanded the case for reconsideration of the evidence under Section 718.205(c), concluding that the administrative law judge improperly evaluated the competing medical opinion evidence regarding the extent to which the miner's

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respiratory failure, pneumonia and hypoxic encephalopathy as underlying causes of the miner's death, and indicates that coronary artery disease and tobacco smoking were significant conditions contributing to his death. *Id*.

[2]The miner filed living miner's claims on December 20, 1979, September 17, 1990 and October 14, 1992. Director's Exhibit 38. The most recent of the claims was finally denied by the district director on August 12, 1993, after which the miner took no further action in pursuit of benefits. *Id*. A living miner's claim is not at issue in the instant case.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 38.

pneumoconiosis affected the pulmonary condition that contributed to his death. *Fuller v. Clinchfield Coal Co.*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). In reaching this result, the court held that employer fairly stipulated to the presence of coal workers' pneumoconiosis and anthracosis in the miner's lungs, as indicated by the autopsy, but did not stipulate that the miner had a pulmonary or respiratory impairment *Id.* The court observed that Section 718.201 did not require "coal workers' pneumoconiosis" or "anthracosis" to attain the status of an 'impairment' to be classified as 'pneumoconiosis.' *Id*. The court thus held that employer's stipulation to pneumoconiosis arising out of coal mine employment was, contrary to the administrative law judge's finding, "not necessarily inconsistent with what [employer's] experts perceived." *Id*. at 180 F.3d 625, 21 BLR 2-661. By Order dated September 13, 1999, the Board remanded the case to the administrative law judge for reconsideration of the conflicting medical opinions under Section 718.205(c)(2) pursuant to the court's decision. *Fuller v. Clinchfield Coal Co.*, BRB No. 97-1204 BLA (May 5, 1998)(unpublished Order).

In his Decision and Order on Remand dated October 27, 1999, the administrative law judge determined that the medical opinion evidence was insufficient to establish that the miner's death was due to pneumoconiosis under Section 718.205(c), and denied benefits. In a subsequent Order dated November 1, 1999, the administrative law judge denied claimant's motion for a limited re-opening of the record, in which claimant requested an opportunity to support her contention that employer's stipulation to pneumoconiosis arising out of coal mine employment should be interpreted as a stipulation to a respiratory or pulmonary impairment as well.

On appeal, claimant argues that her right to representation was violated because the administrative law judge did not provide adequate notice of a Decision and Order allegedly issued on October 15, 1999. Claimant also argues that her right to due process was violated when the administrative law judge denied the motion to re-open the record. Additionally, claimant asserts that, in discussing the parties' stipulation to pneumoconiosis arising out of coal mine employment in the instant case, the Fourth Circuit held that employer's stipulation included a stipulation to an impairment, though it was only possible that the stipulation could be interpreted otherwise. Claimant contends that the court essentially left the question open with an instruction for the administrative law judge to interpret the stipulation. Claimant argues that the administrative law judge should have found that employer's stipulation included a stipulation to impairment, and should have concluded, therefore, that the opinions of employer's experts are less persuasive under Section 718.205(c)(2) on the ground that the opinions, which indicate that the miner's pneumoconiosis was too mild to have resulted in pulmonary or respiratory impairment or to have contributed to death, contradict employer's stipulation. Finally, claimant specifically takes issue with the administrative law judge's reliance upon the opinion of Dr. Branscomb. Employer responds, urging the Board to reject claimant's contentions and affirm the denial of benefits. Also, by cross-appeal, employer contends that the administrative law judge on

[4]The administrative law judge discounted employer's experts' opinions on this same basis in his prior, 1997 Decision and Order.

remand again improperly interpreted employer's stipulation. Employer also challenges the administrative law judge's rejection of Dr. Fino's opinion. Claimant responds to employer's cross-appeal, urging the Board to reject employer's position with regard to the stipulation. Employer has filed a reply brief, reiterating its contentions raised in its response brief and on cross-appeal pertaining to the stipulation. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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. 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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. *See* 20 C.F.R. §§718.1, 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). The United States Court of Appeals for the Fourth Circuit has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). See *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Initially, we reject claimant's assertion that her rights to representation and due process were violated in this case. First, there is no merit in claimant's contention that she was prejudiced by the administrative law judge's failure to provide her with a copy of a Decision and Order dated October 15, 1999. Although the administrative law judge referred to a Decision and Order dated October 15, 1999 in his Order Denying Claimant's Motion to Re-open the Record, dated November 1, 1999, there was no Decision and Order issued on October 15, 1999 in this case. It is clear that the reference to October 15, 1999, rather than October 27, 1999 – the date of the Decision and Order on remand denying benefits – was a typographical error. *See* November 1, 1999 Order at 1. Second, the administrative law judge did not violate claimant's due process rights in denying claimant's motion to re-open the record, which claimant argues was necessary to allow her to address the interpretation of employer's stipulation. Claimant argues that in remanding this case the Fourth Circuit held that employer stipulated to pneumoconiosis arising out of coal mine employment, *including* a pulmonary or respiratory impairment, and only *might* have stipulated otherwise. Claimant contends that the issue of what employer stipulated to was thus open to interpretation, and that the administrative law judge should have let claimant address that issue by re-opening the record on remand. We agree with employer, however, that the Fourth Circuit clearly held that employer's stipulation did not include a stipulation to impairment. The court noted that the miner's autopsy revealed the presence of coal worker's pneumoconiosis and anthracosis in the miner's lungs. *Fuller v. Clinchfield Coal Co.*, *supra* at 180 F.3d 625, 21 BLR 2-661; Director's Exhibits 4, 19.

Observing that "Section 718.201 nowhere requires these coal dust-specific diseases to attain the status of an 'impairment' to be classified as pneumoconiosis," the court explicitly held that "[t]his is what [employer] fairly stipulated to when it agreed that [the miner] had pneumoconiosis 'as defined by the Act and regulations.'" *Id*. Thus, contrary to claimant's contention, whether employer's stipulation to pneumoconiosis arising out of coal mine employment was also a stipulation to impairment was not open to interpretation on remand; therefore, claimant was not prejudiced by the administrative law judge's denial of claimant's motion to re-open the record to address the issue.

Furthermore, in light of claimant's mischaracterization of the Fourth Circuit's holding in this case, there is no merit in claimant's contention that the administrative law judge should have accorded less weight to the opinions of employer's experts, namely those of Drs. Naeye, Caffrey, Hansbarger, Branscomb, Kleinerman and Sargent, on the basis that they were contradictory to a stipulation that the miner had pneumoconiosis with attendant pulmonary or respiratory impairment. As discussed *supra*, the administrative law judge discounted employer's experts' opinions on this basis in his 1997 Decision and Order, and the court held that this was error. Claimant also argues that the administrative law judge improperly relied greatly on Dr. Branscomb's opinion that the miner's death was due to heart disease, and that the miner's minimal pneumoconiosis did not contribute in any way to his death. Decision and Order at 9-10; Director's Exhibit 32. Claimant argues that the administrative law judge should have discounted Dr. Branscomb's opinion as unreasoned and undocumented. Whether a medical opinion is reasoned and documented, however, is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). Claimant is incorrect in suggesting that Dr. Branscomb based his opinion on a misunderstanding that the miner had diabetes, a condition with which, claimant argues, the miner was never diagnosed. Dr. Branscomb did not attribute the miner's heart disease to diabetes. Dr. Branscomb merely stated that his review of the medical records indicated that the miner "seem[ed] to have had diabetes[,] although all the records did not say so." Director's Exhibit 32. In discussing the miner's fatal heart disease, Dr. Branscomb stated that the miner "certainly had morbid obesity, high cholesterol, severe coronary artery disease, heart attacks, hypertension, and an enlarged heart," which claimant does not contest. *Id*. We hold that the administrative law judge acted within his discretion in determining that Dr. Branscomb's opinion was persuasive, *see Clark, supra; Tackett, supra*, and in finding that Dr. Turner's medical opinion, that the miner's death was hastened by pneumoconiosis, Director's Exhibits 6, 7, 14; Employer's Exhibit 6, was insufficient to establish, in light of all the medical opinion evidence of record, that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 9-10. We, therefore, affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis thereunder, and the consequent denial of benefits.

We need not consider employer's contention on cross-appeal with regard to Dr. Fino's opinion. Any error with respect to the administrative law judge's weighing of Dr. Fino's opinion is harmless in view of our holding that the administrative law judge properly

denied benefits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order After Remand – Benefits Denied is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[5]Employer's other contention on cross-appeal relating to the nature of its stipulation has been addressed herein in the consideration of claimant's appeal.