BRB No. 06-0503 BLA

ETTA PARKS (Widow of GORDON PARKS)	)	
Claimant-Petitioner	)	
v.	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 12/07/2006
and	)	
JAMES RIVER COAL COMPANY	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (04-BLA-5490) of Administrative Law Judge Joseph E. Kane 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] This case involves a survivor's claim filed on February 14, 2002.[3] The

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[1]Claimant is the surviving spouse of the deceased miner who died on November 2, 2001. Director's Exhibit 8.

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

[3]The miner filed a claim with the Social Security Administration (SSA) on September 28, 1972. Director's Exhibit 1. The SSA denied benefits on September 13, 1974. *Id.* The Department of Labor denied benefits on June 15, 1981. *Id.* There is no indication that the miner took any further action in regard to his 1973 claim.

The miner filed a second claim on January 29, 1992. Director's Exhibit 1. Administrative Law Judge Frank D. Marden found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Judge Marden, therefore, considered the merits of the miner's 1992 claim. Judge Marden found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Accordingly, Judge Marden denied benefits. *Id.* By Decision and Order dated March 21, 1997, the Board affirmed Judge Marden's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) (2000). *Parks v. Leeco, Inc.*, BRB No. 96-0738 BLA (Mar. 21, 1997) (unpublished). However, the Board vacated Judge Marden's findings pursuant to 20 C.F.R. §§725.309 and 718.202(a)(1) (2000) and remanded the case for further consideration. *Id.* The Board subsequently denied employer's motion for reconsideration. *Parks v. Leeco, Inc.*, BRB No. 96-0738 BLA (Feb. 12, 1998) (Order) (unpublished). On remand, Administrative Law Judge Ainsworth H. Brown found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 1. Judge Brown, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, Judge Brown denied benefits. *Id.* By Decision and Order dated September

administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was 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 contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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

Benefits are payable on survivors' claims filed on or after January 1, 1982 only if the miner's death is due to pneumoconiosis. *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

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13, 1999, the Board affirmed Judge Brown's denial of benefits. *Parks v. Leeco, Inc.*, BRB No. 99-0177 BLA (Sept. 13, 1999) (unpublished).

The miner subsequently filed a request for modification. Director's Exhibit 1. In a Proposed Decision and Order dated May 24, 2000, the district director denied the miner's request for modification. *Id.* The case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* On January 31, 2001, the miner filed a motion to voluntarily withdraw his claim. *Id.* In a Decision dated January 26, 2001, Administrative Law Judge Rudolf L. Jansen ordered that the miner's claim be withdrawn. *Id.* In a Decision and Order dated February 16, 2001, Judge Jansen denied employer's motion for reconsideration. *Id.* There is no indication that the miner took any further action in regard to his 1992 claim.

[4]Because no party challenges 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)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 CF.R §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Claimant argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge properly found that all of the x-ray interpretations are negative for the existence of pneumoconiosis.[5] Decision and Order at 7. We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically argues that the administrative law judge erred in finding that Dr. Spady's opinion is insufficient to establish the existence of pneumoconiosis. Dr. Spady completed a questionnaire on February 12, 2002.[6] Director's Exhibit 9. Dr. Spady opined that the miner suffered from "COPD/pneumoconiosis." *Id.* The administrative law judge found that "Dr. Spady's diagnosis of chronic obstructive pulmonary disease, which he apparently attributed to the

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[5]Claimant fails to identify any x-ray evidence that would support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1). Three x-ray interpretations were submitted in connection with the survivor's claim. Dr. Stinnett interpreted a March 6, 2000 x-ray as revealing a soft tissue mass in the left lung field. Director's Exhibit 10. Dr. Stinnett noted that this mass was "suspicious for a carcinoma." *Id.* Dr. Stinnett did not, however, interpret the miner's March 6, 2000 x-ray for pneumoconiosis. Two other physicians, Drs. Halbert and Rosenberg, interpreted the miner's March 6, 2000 x-ray. Dr. Halbert, a B reader and Board-certified radiologist, interpreted the miner's March 6, 2000 x-ray as negative for pneumoconiosis. Employer's Exhibit 5. Dr. Rosenberg, a B reader, also interpreted the miner's March 6, 2000 x-ray as negative for pneumoconiosis. Employer's Exhibit 3.

[6]The record also contains Dr. Spady's treatment notes from December 31, 1990 to April 14, 2000. Director's Exhibit 10. Dr. Spady's diagnoses include chronic obstructive pulmonary disease. *Id.* In his March 7, 2000 treatment notes, Dr. Spady indicated that his diagnosis of chronic obstructive pulmonary disease was based on history. *Id.*

miner's coal mine employment, [was] not sufficiently supported."[7] Decision and Order at 7. Because Dr. Spady provided no basis for his diagnosis, the administrative law judge properly found that the doctor's diagnosis was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7.

The administrative law judge further noted that Drs. Broudy and Rosenberg opined that there was no objective evidence of chronic obstructive pulmonary disease.[8] Decision and Order at 7. In considering the conflicting opinions of Drs. Spady, Broudy and Rosenberg, the administrative law judge permissibly credited the opinions of Drs. Broudy and Rosenberg over that of Dr. Spady based upon their superior qualifications.[9] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

We reject claimant's contention that the administrative law judge erred in failing to accord greater weight to Dr. Spady's opinion based upon his status as the miner's treating physician. 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

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[7]A diagnosis of chronic obstructive pulmonary disease attributable to the miner's coal mine employment, if credited, is sufficient to constitute a diagnosis of "legal" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

[8]In a medical report dated December 14, 2004, Dr. Broudy opined that there was not sufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Broudy further opined that there was no evidence that the miner had any impairment which arose from the inhalation of coal mine dust. *Id.* During a January 13, 2005 deposition, Dr. Broudy reviewed the causes of death listed on the miner's death certificate (pneumonia, lung cancer and chronic obstructive pulmonary disease) and opined that none of these diseases was attributable to the miner's coal mine employment. Employer's Exhibit 2 at 10.

In a medical report dated December 20, 2004, Dr. Rosenberg opined that the miner did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 3. Dr. Rosenberg also opined that there was no objective evidence of chronic obstructive pulmonary disease. *Id.* Dr. Rosenberg reiterated his opinions during a February 1, 2005 deposition. Employer's Exhibit 4.

[9]Drs. Broudy and Rosenberg are Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibits 6, 7. Dr. Spady's qualifications are not found in the record.

opinion of a treating physician in black lung claims.[10] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). 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.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that an administrative law judge must evaluate the opinions of treating physicians just as they consider the opinions of other experts. *Id.* As discussed, *supra*, the administrative law judge accorded less weight to Dr. Spady's opinion because he found that his diagnosis was not sufficiently reasoned. *Lucostic, supra*; Decision and Order at 7. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits in this survivor's claim under 20 C.F.R. Part 718. *Trumbo, supra*. Consequently, we need not address claimant's contentions of error regarding the administrative law judge's finding at 20 C.F.R. §718.205(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10]Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge