

BRB Nos. 12-0365 BLA  
and 12-0489 BLA

MURIEL CUNDIFF	)	
(Widow of and o/b/o JERRY CUNDIFF)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 02/25/2013
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits on Remand (2005-BLA-05931 and 2005-BLA-05932) of Administrative Law Judge Joseph E. Kane

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<sup>1</sup> Claimant is the widow of Jerry Cundiff, the deceased miner. Director's Exhibit 34. The miner initially filed an application for benefits on November 28, 1988, which was finally denied on May 18, 1989, because the evidence was insufficient to establish any element 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 September 10, 2001.

rendered on a miner's subsequent claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>2</sup> This case is before the Board for the second time.<sup>3</sup>

In the prior decision, Administrative Law Judge Thomas F. Phalen, Jr., credited the miner with thirty-seven years of coal mine employment and, with respect to the miner's subsequent claim, determined that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Judge Phalen also found that the evidence established that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). With respect to the survivor's claim, Judge Phalen found that the evidence was sufficient to establish that pneumoconiosis substantially contributed to, and/or hastened, the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Phalen awarded benefits in both the miner's and the survivor's claims.

Pursuant to employer's appeal, the Board affirmed Judge Phalen's findings of thirty-seven years of coal mine employment, but vacated Judge Phalen's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, consequently, vacated Judge Phalen's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Specifically, the Board held that Judge Phalen failed to adequately explain, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), whether he found that claimant established the existence of clinical

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Director's Exhibit 3. While the case was pending, the miner died on May 3, 2004. Director's Exhibit 34. Claimant filed a survivor's claim on July 6, 2004, which was consolidated with the miner's subsequent claim. Director's Exhibits 34, 37.

<sup>2</sup> The parties agree that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as both the miner's and the survivor's claims were filed prior to January 1, 2005. See Pub. L. No. 111-148, §1556(a), (c); 30 U.S.C. §§921(c)(4) and 932(l).

<sup>3</sup> The complete procedural history of this case is contained in the Board's prior decision addressing employer's appeal of the award of benefits. *Cundiff v. Peabody Coal Co.*, BRB Nos. 09-0295 BLA and 09-0593 BLA (Jan. 28, 2010) (unpub.).

pneumoconiosis, or legal pneumoconiosis, or both.<sup>4</sup> *Cundiff v. Peabody Coal Co.*, BRB Nos. 09-0295 BLA and 09-0593 BLA, slip op. at 6 (Jan. 28, 2010) (unpub.). The Board further held that Judge Phalen erred in his consideration of the medical opinion evidence in finding the existence of pneumoconiosis established, pursuant to 20 C.F.R. §718.202(a)(4), and in finding that the miner was totally disabled, pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>5</sup> Finally, in light of its determinations to vacate Judge Phalen's credibility findings relevant to the existence of pneumoconiosis, and total disability, the Board vacated Judge Phalen's determination that claimant satisfied her burden to establish that the miner's total disability was due to pneumoconiosis under 20 C.F.R. §718.204(c). *Cundiff*, BRB Nos. 09-0295 BLA and 09-0593 BLA, slip op. at 8. Thus, the Board vacated the award of benefits in the miner's claim and remanded this case for further consideration. Turning to the survivor's claim, because the Board vacated Judge Phalen's findings with respect to the issue of the existence of pneumoconiosis, it also vacated his finding that the miner's death was hastened by pneumoconiosis under 20 C.F.R. §718.205(c). The Board, therefore, also vacated the award of benefits in the survivor's claim and remanded the case for further consideration.

On remand, due to Judge Phalen's retirement, the case was reassigned, without objection, to Administrative Law Judge Joseph E. Kane (the administrative law judge). Following the acceptance of additional briefing, in a decision dated March 28, 2012, the administrative law judge considered the medical opinion evidence, and found that it did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an

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<sup>4</sup> A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "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). 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 encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

<sup>5</sup> The Board affirmed, as unchallenged, Judge Phalen's findings that claimant did not establish 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). *Cundiff*, BRB Nos. 09-0295 BLA and 09-0593 BLA (unpub.), slip op. at 3; *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).

essential element of entitlement in both the miner's and survivor's claims. Accordingly, the administrative law judge denied benefits in both claims.

On appeal, claimant initially asserts that she was denied due process of law under the APA, 5 U.S.C. §556(d), when this case was transferred to a new administrative law judge for a decision on remand. Claimant further asserts that, in finding that claimant failed to establish that the miner had pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge failed to consider all relevant evidence, and erred in his evaluation of the medical opinion evidence. 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.

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.<sup>6</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially contends that she was unduly prejudiced by the reassignment of the case to the administrative law judge on remand, and requests that this case be remanded for a new hearing. Claimant's Brief at 3-5, 12. Contrary to claimant's argument, the record reflects that, by Order dated September 21, 2010, all parties were notified that Judge Phalen had retired, and that the case would be reassigned to a new administrative law judge for a decision on remand. In addition, while the parties were given until October 1, 2010 to object to the reassignment of this case, claimant did not file an objection. Thus, claimant is considered to have waived any objection to the reassignment of this case. *See, e.g., Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995). Therefore, we reject claimant's contention that she was denied due process of law under the APA when this case was reassigned, on remand, to the administrative law judge. Moreover, the issues on remand in this case were not dependent upon an assessment of claimant's testimony at the hearing. *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-24 (1991)(Stage, J., dissenting); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-67 (1990). Consequently, we decline claimant's request to remand this case for a new hearing.

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<sup>6</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 38.

Turning to the merits of entitlement in the miner's claim, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he was totally disabled and that his disability was 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

When 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 mine employment or that the miner was totally disabled by pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing at least 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.

Initially, we reject claimant's argument that the administrative law judge, on remand, failed to conduct a thorough evaluation of the medical evidence of record. Claimant contends that while Judge Phalen's summary of the evidence was nine pages, on remand, the administrative law judge performed only a "cursory review of the record to accommodate a quick decision." Claimant's Brief at 5. Contrary to claimant's argument, the administrative law judge found that Judge Phalen had adequately and thoroughly summarized all the medical evidence, as claimant concedes, and specifically incorporated by reference Judge Phalen's medical summary "as if fully stated in this decision." Decision and Order on Remand at 5. Thus, there is no merit to claimant's contention that the administrative law judge's decision was based on an incomplete summary of the medical evidence.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Simpao, Hardison, O'Bryan, Fino, Branscomb, Repsher, and Caffrey, regarding the existence of both clinical and legal pneumoconiosis. Decision and Order on Remand at 15-16; Director's Exhibits 12, 62, 63; Claimant's Exhibits 3, 4; Employer's Exhibits 1-3, 5 at 6. Turning first to the evidence relevant to the existence of clinical

pneumoconiosis, the administrative law judge correctly noted that Drs. Simpao, Hardison, O'Bryan, and Fino each diagnosed the existence of clinical pneumoconiosis, while Drs. Branscomb, Repsher and Caffrey, opined that the miner did not suffer from any form of the disease. Decision and Order on Remand at 15-16.

The administrative law judge found that the existence of clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), as none of the physicians diagnosing clinical pneumoconiosis gave a well-reasoned and well-documented diagnosis. Decision and Order on Remand at 16. Specifically, the administrative law judge noted that as Drs. Simpao, Hardison, O'Bryan, and Fino based their diagnoses of clinical pneumoconiosis primarily on a positive chest x-ray and the miner's history of coal mine dust exposure,<sup>7</sup> without additional explanation, their opinions were merely restatements of an x-ray reading. Decision and Order on Remand at 15. Moreover, the administrative law judge noted that the x-ray evidence did not establish the existence of pneumoconiosis. Decision and Order On Remand at 15. The administrative law judge, therefore, permissibly found that the opinions of Drs. Simpao, Hardison, O'Bryan, and Fino were not sufficiently reasoned. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order on Remand at 15-16; Director's Exhibit 12; Claimant's Exhibit 3; Employer's Exhibits 2, 5 at 6.

With respect to the existence of legal pneumoconiosis, the administrative law judge properly found that only Dr. Hardison, the miner's treating physician, clearly diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), due to a combination of cigarette smoking and coal mine dust exposure. Decision and Order on Remand at 16; Claimant's Exhibit 3 at 13. The administrative law judge correctly noted that Dr. Hardison stated that he based his conclusion, that coal mine dust exposure was a primary contributor to the miner's COPD, on the fact that the

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<sup>7</sup> The administrative law judge noted that Dr. Simpao diagnosed "CWP 2/2," based on the miner's x-ray and "multiple years of coal dust exposure." Decision and Order on Remand at 15; Director's Exhibit 12. The administrative law judge noted that Dr. Hardison stated that he would not have diagnosed pneumoconiosis if he had not seen the fibrotic changes on the miner's x-ray. Decision and Order on Remand at 15; Claimant's Exhibit 3 at 29. The administrative law judge also noted Dr. O'Bryan's statement that his diagnosis of pneumoconiosis was based on a chest x-ray. Decision and Order on Remand at 15; Employer's Exhibit 5 at 6. Finally, the administrative law judge noted that Dr. Fino stated that he assumed the miner had pneumoconiosis because a majority of the x-rays he reviewed were positive for simple pneumoconiosis. Decision and Order on Remand at 15; Employer's Exhibit 2 at 7.

miner's x-rays showed interstitial fibrotic changes and were full of white opacities of pneumoconiosis. Decision and Order on Remand at 17; Claimant's Exhibit 3 at 8-9, 12, 13, 21. Contrary to claimant's argument, the administrative law judge rationally discounted Dr. Hardison's opinion as unpersuasive, because Dr. Hardison relied heavily on positive x-ray evidence of pneumoconiosis as his reason for diagnosing legal pneumoconiosis, where the administrative law judge found the x-ray evidence was negative for the existence of the disease. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 17-18. Moreover, as the administrative law judge permissibly found Dr. Hardison's opinion to be unreasoned, there is no merit to claimant's contention that Dr. Hardison's opinion should have been accorded controlling weight as the miner's treating physician. See 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003)(the opinions of treating physicians get the deference they deserve based on their power to persuade); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002) (an administrative law judge must evaluate the opinions of treating physicians just as he considers those of other experts); Claimant's Brief at 12. Thus, we affirm the administrative law judge's determination that Dr. Hardison's medical opinion did not meet claimant's burden to establish the existence of legal pneumoconiosis. Decision and Order on Remand at 17, 19-20.

The administrative law judge also permissibly found that Dr. Fino's opinion, that assuming that coal workers' pneumoconiosis was present, he could not exclude coal mine dust inhalation as a cause of the miner's obstruction, was too equivocal to constitute a diagnosis of legal pneumoconiosis. See *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 18; Employer's Exhibit 2 at 7. In addition, the administrative law judge rationally found that, to the extent Dr. Fino diagnosed legal pneumoconiosis, his opinion that he could not "exclude" coal mine dust inhalation as a contributing cause of the miner's impairment, was not sufficient to meet claimant's burden to affirmatively establish the presence of the disease. See *Williams*, 338 F.3d at 515, 22 BLR at 2-651. We, therefore, affirm the administrative law judge's determination to accord no weight to Dr. Fino's opinion.

The task of determining the credibility of a physician's opinion is committed to the discretion of the administrative law judge. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). Because the administrative law judge explained his findings, as the Board instructed him to do, and substantial evidence supports the administrative law judge's determination to discredit the opinions of Drs.

Simpao, Hardison, O'Bryan, and Fino, the only medical opinions supportive of a finding that the miner had either clinical or legal pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

We further reject claimant's contention that by not discussing, in detail, Dr. Hardison's medical and hospital treatment notes, and the miner's death certificate, which was also completed by Dr. Hardison, the administrative law judge failed to consider all relevant evidence. Claimant's Brief at 8. As claimant asserts, the miner's treatment records document his treatment for multiple medical conditions, including pneumoconiosis and COPD, and the miner's death certificate lists COPD and congestive heart failure as the immediate causes of death. Director's Exhibits 34 at 12, 49. However, the treatment records and death certificate do not contain any additional discussion of the bases for these diagnoses, beyond the bases provided by Dr. Hardison in his deposition testimony. Thus, because the administrative law judge thoroughly addressed Dr. Hardison's deposition testimony, and permissibly discredited, as unreasoned, the doctor's opinion regarding the existence of both clinical and legal pneumoconiosis, the administrative law judge's failure to discuss, in detail, Dr. Hardison's additional notations of "pneumoconiosis" and "COPD," contained in the treatment notes and on the death certificate, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Martin*, 400 F.3d at 306, 23 BLR at 2-285; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Thus, contrary to claimant's contentions, the administrative law judge considered all of the relevant, probative evidence of record, and explained his findings on remand, as directed by the Board. Therefore, we affirm the administrative law judge's finding that claimant did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement. *See Anderson*, 12 BLR at 1-112. As claimant raises no other arguments, we affirm the denial of benefits in the miner's claim. *See* 20 C.F.R. §802.211(b).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Failure to establish any one of these elements precludes entitlement. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27 (1987).



The administrative law judge properly found that, because claimant failed to establish that the miner suffered from pneumoconiosis, she failed to establish a necessary element of entitlement in a survivor's claim under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; Decision and Order on Remand at 20. We, therefore, affirm the denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand 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