EVA M. WRIGHT (Widow of CLARENCE M. WRIGHT) Claimant-Petitioner v. SEA "B" MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	BRB No. 99-0176 BLA
CLARENCE M. WRIGHT Claimant-Petitioner v. SEA "B" MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	BRB No. 99-0976 BLA DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

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

employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (96-BLA-1100) of Administrative Law Judge John C. Holmes (the administrative law judge) denying benefits on a miner'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 also appeals the Decision and Order (97-BLA-0703) of the administrative law judge denying benefits on a survivor's claim.[2]

In his initial consideration of the miner's claim, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203. Although the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits in the miner's claim.

In response to claimant's appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2), 718.203 and 718.204(c). However, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.204(b). The Board instructed the administrative law judge to make a length of coal mine employment finding and to weigh all of the relevant medical opinions which discuss the cause of the miner's respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Further, the Board instructed the administrative law judge to address claimant's contention that the miner never smoked and to consider whether the physicians'

[1]Claimant is the widow of the miner, Clarence M. Wright, who died on June 4, 1996. Director's Exhibit 5. Claimant filed her survivor's claim on July 19, 1996. Director's Exhibit 1.

[2]By Order dated July 9, 1999, the Board consolidated these appeals.

opinions were based on an inaccurate assessment of the miner's smoking history. Lastly, the Board instructed the administrative law judge to initially address whether claimant has established a material change in conditions since this case involves a duplicate claim. *Wright v. Sea "B" Mining Co.*, BRB No. 98-0110 BLA (Nov. 19, 1998)(unpub.).

On remand, the administrative law judge credited the miner with twenty-three years of coal mine employment and found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Consequently, the administrative law judge concluded that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309.[3] Accordingly, the administrative law judge again denied benefits in the miner's claim. In his consideration of the survivor's claim, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal in the miner's claim, BRB No. 99-0976 BLA, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Further, on appeal in the survivor's claim, BRB No. 99-0176 BLA, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of these denials. The Director, Office of Workers' Compensation Programs, has declined to participate in either of these appeals.

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 into the

[3]Administrative Law Judge John C. Holmes (the administrative law judge) stated that "Claimant's petition for modification on remand is denied." Decision and Order on Remand at 4. We note that the administrative law judge correctly considered the miner's duplicate claim pursuant to 20 C.F.R. §725.309.

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

Initially, we will address claimant's contention with respect to the miner's claim. After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The prior claim was denied because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 43. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The Fourth Circuit has held that pneumoconiosis must be at least a contributing cause of a miner's totally disabling respiratory impairment in order to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Whereas Dr. Forehand opined that the miner was totally disabled due to pneumoconiosis,[4] Director's Exhibit 18, Drs. Caffrey, Castle,[5] Fino and Tomashefski

[4]Dr. Forehand opined that the miner's work-limiting respiratory impairment arose from overexposure to coal dust and coal workers' pneumoconiosis. Director's Exhibit 18.

[5]Based on testimony that is not in the record, claimant asserts that Dr. Castle's opinion is not credible because he relied upon objective tests performed by a technician who has never been licensed as a certified pulmonary technician. The administrative law judge found "the analysis of Dr. Castle particularly credible with respect to the cause of disability." Decision and Order on Remand at 3. The administrative law judge observed that Dr. Castle "bases [his] findings on the testing and review of all the medical evidence, and is specific about attributing test results to his conclusions." *Id*. Thus, inasmuch as the Board cannot consider evidence that was not part of the record before the administrative law judge, we reject claimant's assertion that Dr. Castle's opinion is not credible. *See Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). The Board will not interfere with credibility

opined that the miner was not totally disabled due to pneumoconiosis,[6] Employer's

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determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

[6]Claimant asserts that the administrative law judge erred in considering Dr. Kleinerman's opinion since the Board held that it is not relevant to the issue of total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The administrative law judge stated, "[a]s correctly noted by the Board, Dr. Kleinerman's thorough report is directed almost exclusively toward the issue of death due to pneumoconiosis; however, he does find that the extent of simple pneumoconiosis is not likely to cause significant pulmonary impairment, but rather blames abnormal pulmonary function testing on cigarette smoking, while noting his arteriosclerosis and heart problems."

Exhibits 16, 22-24. Drs. Holliman, Scott and Stefanini diagnosed coal workers' pneumoconiosis. Director's Exhibit 16; Claimant's Exhibit 1. The administrative law judge properly accorded greater weight to the opinions of Drs. Caffrey, Fino and Tomashefski than to the contrary opinion of Dr. Forehand because of their superior qualifications.[7] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinion of Dr. Forehand.

Decision and Order on Remand at 2-3. The administrative law judge also stated, "[s]ince Dr. Kleinerman did not directly address the issue of cause of pulmonary disability, I give his opinion on this issue less weight than might have appeared in my original decision." *Id*. at 3. Inasmuch as the administrative law judge did not rely on Dr. Kleinerman's opinion to support his finding that the evidence is insufficient to establish total disability due to pneumoconiosis, we hold that any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7]Dr. Fino is Board-certified in internal medicine and pulmonary disease. Employer's Exhibit 22. Drs. Caffrey and Tomashefski are Board-certified in anatomical and clinical pathology. Employer's Exhibits 23, 24. The administrative law judge correctly stated that "Dr. Forehand is not an expert in pulmonary medicine." Decision and Order on Remand at 2. Although Dr. Forehand is a B-reader, Dr. Forehand's credentials as a B-reader are not relevant under 20 C.F.R. §718.204(b).

In addition, claimant asserts that the administrative law judge should have accorded determinative weight to the opinions of Drs. Forehand, Holliman,[8] Mitchell and Scott based on their status as the miner's treating physicians. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *cf. Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel, supra*; *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Finally, we reject claimant's assertion of bias by the administrative law judge in weighing the conflicting medical opinions because there is no evidence in the record to support this assertion.[9] *See generally Cochran v. Consolidation Coal Co.*,

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[8]Claimant asserts that the administrative law judge erred in failing to consider the opinion of Dr. Holliman. Although Dr. Holliman diagnosed coal workers' pneumoconiosis, Dr. Holliman did not address the issue of whether the miner's total disability was due to pneumoconiosis. Director's Exhibit 16. Thus, we reject claimant's assertion.

[9]We are not persuaded by claimant's assertion that the administrative law judge's statements with regard to the miner's smoking history indicate that the administrative law judge is biased. In determining the length of the miner's smoking history, the administrative law judge considered the miner's testimony and the statements of Drs. Buddington and Stewart with regard to this issue. The administrative law judge stated, "[s]ince smokers often tend to minimize their smoking history, I find that Claimant had smoked approximately twenty years quitting around 1960." Decision and Order on Remand at 2. The administrative law judge also stated, "[a]n irrelevant curiosity not previously mentioned is the 1980 finding in Dr. Stewart's report of coal dust under Claimant's fingernails[,] a virtual impossibility since he'd left the mines seven years before. Dirt perhaps?" *Id*. at 4. Nonetheless, the administrative law judge stated, "[i]n analyzing the effect [that his smoking history] finding has on the physicians' reports of record as required by the Board, I find little impact since nearly all [of the physicians] discuss the Claimant's pulmonary problems in terms of his coronary artery/heart condition versus coal dust exposure

12 BLR 1-136 (1989). Thus, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Robinson, supra*. We further affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter, supra*. We thus affirm the administrative law judge's denial of benefits in the miner's claim.

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rather than smoking versus pneumoconiosis." *Id*. at 2.

Next, we address claimant's contention, with respect to the survivor's claim, that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[10] *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 must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *See Boyd*, *supra*. The Fourth Circuit has adopted the standard whereby pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

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[10]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, 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.

20 C.F.R. §718.205(c).

The administrative law judge considered the death certificate signed by Dr. Mitchell and the medical reports of Drs. Caffrey, Castle, Fino, Holliman, Jones, Kleinerman, Stefanini and Tomashefski. Whereas Dr. Jones opined that pneumoconiosis contributed to the miner's death, Director's Exhibit 13, Drs. Caffrey, Castle, Fino, Kleinerman and Tomashefski opined that pneumoconiosis did not contribute to the miner's death, Director's Exhibit 25; Employer's Exhibits 21-23. In the death certificate, Dr. Mitchell indicated that coal workers' pneumoconiosis was a cause of the miner's death. Director's Exhibit 5. Drs. Holliman and Stefanini diagnosed coal workers' pneumoconiosis.[11] Director's Exhibit 13. The administrative law judge permissibly discredited the opinion of Dr. Jones because he found it to be not well reasoned.[12] See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Similarly, the administrative law judge permissibly discredited the death certificate because he found it to be not well reasoned.[13] *See Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the death certificate and the opinion of Dr. Jones.[14]

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[11]Claimant's assertion that the administrative law judge mischaracterized Dr. Stefanini's opinion lacks merit. Dr. Stefanini did not opine that coal workers' pneumoconiosis contributed to the miner's death. Director's Exhibit 13.

[12]The administrative law judge stated that "rather than give a clear rationale for finding that pneumoconiosis caused in part the hastening of [the miner's] death, [Dr. Jones] opines, negatively, that such a situation cannot be disproved." Decision and Order at 7.

[13]The administrative law judge stated that "the death certificate...is conclusionary." Decision and Order at 7. The administrative law judge observed that "[w]hile it mentions pneumoconiosis as a contributing or present condition, it does not analyze how this conclusion is reached." *Id*.

[14]Claimant asserts that the administrative law judge erred in finding that Drs. Castle, Fino and Kleinerman are more qualified than Dr. Jones with respect to rendering an opinion on the cause of the miner's death. While Drs. Castle and Fino are Board-certified in internal medicine and pulmonary disease, Employer's Exhibits 22, 26, Dr. Jones is Board-certified in anatomical and clinical pathology, Director's Exhibit 13. Also, Dr. Kleinerman is Board-certified in anatomical and clinical pathology. Employer's Exhibit 27. The administrative law judge did not explain why a physician who is Board-certified in internal medicine and pulmonary disease is better qualified than a physician who is Board-certified in anatomical and clinical

pathology with respect to rendering an opinion on the cause of a miner's death. Likewise, the administrative law judge did not explain why a physician who is Board-certified in anatomical and clinical pathology is better qualified than a physician with the same credentials. Nonetheless, inasmuch as the administrative law judge provided a valid alternate basis for discounting Dr. Jones' opinion, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he permissibly discredited the opinion of Dr. Jones because he found it to be not well reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we hold that any error by the administrative law judge in this regard is harmless, *see Larioni, supra*.

Claimant asserts that the administrative law judge should have accorded greater weight to the opinions of Drs. Forehand, Holliman, Mitchell and Scott based on their status as the miner's treating physicians. As previously noted, while an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko, supra*, he is not required to do so, *see Akers, supra*; *Franklin, supra*. Furthermore, Drs. Forehand, Holliman and Scott did not render relevant opinions with respect to the issue of whether pneumoconiosis contributed to the miner's death. Director's Exhibit 13.

Further, inasmuch as the identity of the party who hires a medical expert does not, by itself, demonstrate partiality on the part of a physician, we reject claimant's assertion that Drs. Caffrey, Castle, Fino, Jones, Kleinerman and Tomashefski are biased because they were paid by employer. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson, supra*; *Fagg, supra*; *Worley, supra*. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Shuff, supra*.

Hence, in view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trumbo, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, these consolidated appeals are disposed of as follows:

1. In *Wright v. Sea "B" Mining Co.*, BRB No. 99-0906 BLA, the administrative law judge's Decision and Order on Remand denying benefits in the miner's claim is affirmed.

2. In *Wright v. Sea "B" Mining Co.*, BRB No. 99-0176 BLA, the administrative law judge's Decision and Order denying benefits in the survivor's is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge