BRB No. 00-1046 BLA

TIANA J. REYNOLDS (Widow of ANDREW REYNOLDS, JR.)	)	
Claimant-Petitioner	)	
v.	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Jennifer U. Toth and Mary Forrest-Doyle (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1089) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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).[1] This case is before the Board for the second time.[2] The

[1] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 23, 2001, to which both claimant and the Director, Office of Workers' Compensation Programs (the Director), have responded.

The Director contends that the revised regulations will not affect the outcome of this case in any material way. Although claimant contends that 20 C.F.R. §718.104 alters the standard for evaluating the opinion of a treating physician, the revised quality standards relevant to the opinions of treating physicians apply only to evidence developed after January, 19, 2000, *see* 20 C.F.R. §718.101(b). In addition, at issue in this case is the weighing of x-ray and autopsy evidence pursuant to 20 C.F.R. §410.490(b), which was not revised by the new regulations. In regard to establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), Section 718.202(a) was revised only in regard to the consideration of biopsy evidence, which is not contained in the record in this case, *see* 20 C.F.R. §718.202(a)(2), and Section 718.202(a) is not one of the regulations at issue in the lawsuit. Moreover, 20 C.F.R. §718.203, in regard to establishing pneumoconiosis arising out of coal mine employment, was not revised by the new regulations. Although claimant contends that the revised definition of pneumoconiosis under 20 C.F.R. §718.201, which has been challenged in the lawsuit, is a new legal standard that could affect the outcome of the case, the revised definition of pneumoconiosis under Section 718.201, as the Director contends in response, will not affect the outcome of the case because it is consistent with the case-law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. Thus, having considered the briefs submitted by the parties, and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations.

[2] Claimant is the widow of the miner, Andrew Reynolds, Jr., who died on January 1, 1977, Director's Exhibit 1. No claim was filed by the miner. Subsequent to the miner's death, claimant filed a survivor's claim on December 15, 1977, Director's Exhibit 1. In a Decision and Order issued on March 10, 1988, Administrative Law Judge G. Marvin Bober dismissed the survivor's claim as abandoned, Director's Exhibit 57. Judge Bober upheld his decision in a subsequent Order Denying Motion to File Late Motion for Reconsideration issued on February 16, 1990, Director's Exhibit 68. Claimant appealed and the Board

administrative law judge found four and one-half years of coal mine employment established and, therefore, adjudicated this survivor's claim, filed before March 31,1980, pursuant to the interim presumption at 20 C.F.R. §410.490(b)(1) as applied to short-term miners. The administrative law judge found that the existence of pneumoconiosis was not established and/or that pneumoconiosis arising out of coal mine employment was not established by the relevant evidence of record. Thus, the administrative law judge found that invocation of the interim presumption at Section 410.490(b)(1) was not established and, therefore, that entitlement under 20 C.F.R. Part 718 was not established. Accordingly, benefits were denied. On appeal, claimant contends that the medical opinion evidence of record is sufficient to establish coal workers' pneumoconiosis and contends that the administrative law judge erred in not considering the survivor's claim pursuant to the interim presumption at 20 C.F.R. §727.203. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed.[3]

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vacated Judge Bober's Decision and Order dismissing the survivor's claim as abandoned and remanded the case for reconsideration, holding that the Department of Labor's activities in this claim constituted modification proceedings. Director's Exhibits 69, 77. *Reynolds v. Kentland-Elkhorn Coal Corp.*, BRB No. 90-0932 (May 27, 1993)(unpub.). On September 30, 1994, employer filed a Motion for Reconsideration and Request for Enlargement of Time to File Brief in Support arguing that it never received the Board's May 27, 1993 decision remanding this case to the administrative law judge for further consideration and was therefore unaware of the basis of the Board's decision as well as the issues to be reconsidered on remand and was not aware that a decision had been issued until it received the administrative law judge's notice of hearing and prehearing order. Employer therefore requested 30 days from receipt of the copy of the Board's May 27, 1993 Decision and Order to submit a brief in support of its Motion for Reconsideration. By Order dated January 12, 1995, the Board granted employer's motion. Director's Exhibit 85. By Order dated March 14, 1996, the Board denied claimant's motion requesting reconsideration of the January 12, 1995 order granting employer's motion to file a Motion for Reconsideration and enlargement of time, and gave claimant 30 days from receipt of its Order to respond to employer's brief in support of its Motion for Reconsideration. Director's Exhibit 88. Employer submitted its brief in Support of Reconsideration on February 13, 1995. By Order dated April 17, 1996, claimant was granted a 30 day extension to respond to employer's brief on reconsideration. Director's Exhibit 90. On September 24, 1997, the Board denied employer's motion for reconsideration. Director's Exhibit 92.

[3] The administrative law judge dismissed the two named potential responsible operators in this case, Kentland Coal Company and Kentucky Carbon Corporation, Decision and Order at 8-9. Inasmuch as the administrative law judge's finding was not challenged by the Director on appeal, the Board issued an order granting motions filed by both Kentland

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

Coal Company and Kentucky Carbon Corporation to dismiss them as parties in this proceeding. *Reynolds v. Director, OWCP*, BRB No. 00-1046 (Oct. 24, 2000)(unpub. order).

Pursuant to the United States Supreme Court decisions in *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988) and *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991), short-term miners who have established less than ten years of coal mine employment and filed claims on or before March 31, 1980, may avail themselves of the presumption of total disability or death due to pneumoconiosis pursuant to the criteria at 20 C.F.R. §410.490(b) by establishing the existence of pneumoconiosis by x-ray, autopsy or biopsy evidence, and by establishing that this pneumoconiosis arose from coal mine employment. *See Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc*)(Smith, J., concurring; McGranery, J., concurring and dissenting). This presumption may be rebutted by any one of the available methods contained at 20 C.F.R. §727.203(b), *see Phipps, supra*. Moreover, if entitlement is not established pursuant to the interim presumption at Section 410.490(b)(1) as applied to short-term miners, inasmuch as the instant claim was adjudicated after March 31, 1980, entitlement should also be considered under 20 C.F.R. Part 718, *see* 20 C.F.R. §718.2; *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981); *see also Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989). In a survivor's claim filed prior to January 1, 1982, Director's Exhibit 1, where no miner's claim was filed, *see Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988), entitlement may be established based on a finding that the miner was totally disabled due to pneumoconiosis at the time of his death, *see* 20 C.F.R. §§718.1, 718.201; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), or if the evidence of record establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), *see* 20 C.F.R. §§718.1, 718.201, 725.212(a)(3)(ii); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985).[4]

[4] Inasmuch as the administrative law judge's finding that claimant established less than ten years of coal mine employment is not challenged on appeal, it is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, contrary to claimant's contention, because claimant did not establish that the miner had ten years of coal mine employment, claimant is not entitled to consideration of the instant survivor's claim pursuant to the interim presumption at 20 C.F.R. §727.203. *See* 20 C.F.R. §727.203.

Moreover, none of the available presumptions in this survivor's claim filed prior to January 1, 1982, pursuant to 20 C.F.R. §718.303-306 are applicable, *see also* 20 C.F.R. §718.202(a)(3). Inasmuch as there is no evidence of complicated pneumoconiosis in the record, the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable, *see* 20 C.F.R. §§718.205(c)(3), 718.304. In addition, as less than ten years of coal mine employment was established, the rebuttable presumption at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), implemented by 20 C.F.R. §718.303, is inapplicable, *see* 20 C.F.R. §§718.205(b)(4), 718.303(a); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Beard v. Director, OWCP*, 10 BLR 1-82 (1987),

aff'd, 856 F.2d 192 (6th Cir. 1988)(table), the rebuttable presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable, *see* 20 C.F.R. §718.305(a), and the presumption at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, is inapplicable, *see* 20 C.F.R. §718.306(a).

The administrative law judge noted that a 1979 reading of an undated x-ray from Dr. Erylimaz, Director's Exhibit 14, and a reading of a 1976 x-ray from Dr. Sargent were positive for pneumoconiosis, but found that the weight of the autopsy evidence of record was overwhelmingly negative and demonstrated the absence of pneumoconiosis, Decision and Order at 16-17. The administrative law judge considered the autopsy report from Dr. Finley, which did not provide any findings indicating pneumoconiosis, Director's Exhibits 12, 37, and found his opinion supported by the opinions of Drs. Kleinerman, Naeye, Caffrey, Roggli, Sharma, Tuteur, Branscomb, Lane, Anderson, Clarke and Sturgill, who all reviewed the medical evidence of record and/or the autopsy slides and found no evidence of pneumoconiosis. *See* Director's Exhibits 34-35, 38, 40, 42, 44-47, 48B, 58, 125, 127; Employer's Exhibits 1-4, 6-8. The administrative law judge noted that Drs. Naeye, Kleinerman, Caffrey and Roggli were all board-certified pathologists and found the opinions of the physicians who found no evidence of pneumoconiosis were well-reasoned, well-documented and supported by the medical evidence of record. The administrative law judge found the opinions of Dr. Ralph Hess, the miner's treating physician, and Drs. Charles Hess and Abrenio, who all found that the autopsy showed evidence of pneumoconiosis, Director's Exhibits 12, 62, 78, 102; Claimant's Exhibit 1, were not documented and reasoned. In addition, the administrative law judge found the opinion of Dr. Buddington, that the autopsy showed evidence of pneumoconiosis, Director's Exhibit 63, was not entitled to as much weight as the pathologists and pulmonary specialists who found no evidence of pneumoconiosis.

Finally, the administrative law judge found that even if the x-ray evidence were sufficient to establish the existence of pneumoconiosis, the evidence of record from highly qualified physicians who reviewed the entire medical record and autopsy evidence adequately explained that the changes seen on the x-rays were attributable to the miner's heart disease and heart failure and not to coal mine dust inhalation or to the miner's coal mine employment. Thus, the administrative law judge found that entitlement was not established pursuant to the interim presumption at Section 410.490(b)(1) as applied to short-term miners or Part 718, *see* 20 C.F.R. §718.203(c).

Claimant contends that the administrative law judge failed to give proper weight to the opinion of the miner's treating physician, Dr. Ralph Hess. Although the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians on the basis of their familiarity with a miner's condition when he was living, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the facts in the instant case are distinguishable from those in *Tussey*, where the claimant initially consulted a family physician and was then treated by a pulmonary specialist over a period of three years. *See Tussey*, 982 F.2d at 1038, 17 BLR at 2-17. In this case, claimant has not

demonstrated that Dr. Hess was a "treating" physician as contemplated in *Tussey*.[5] Moreover, the principle that a treating physician's opinion may be accorded greater weight should not be applied mechanically without regard to the other evidence of record, *see Halsey v. Richardson*, 441 F.2d 1230 (6th Cir. 1971), and does not extend to opinions by treating physicians which are not well reasoned, undocumented, or otherwise flawed, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

In addition, while claimant notes that Drs. Charles and Ralph Hess, as well as Drs. Abrenio and Buddington, found evidence of pneumoconiosis, claimant's mere recitation of evidence of record which is favorable to his position does not sufficiently identify any error by the administrative law judge with specificity in order to provide any basis for review of the administrative law judge's finding, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP*, 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The administrative law judge, within his discretion, gave greater weight to the opinions of those physicians who found no evidence of pneumoconiosis as he determined that they were better documented and reasoned than the opinions of the physicians who diagnosed pneumoconiosis, *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); the credited opinions were based on a more thorough examination and/or review of the evidence of record, *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985); they were better supported by the evidence of record, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and came from physicians with superior qualifications, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Consequently, the administrative law judge's finding that claimant failed to establish entitlement to the interim presumption at Section 410.490(b)(1) as applied

[5] The qualifications of Dr. Ralph Hess are not indicated in the record and, in regard to whether the miner had pneumoconiosis, Dr. Hess stated only that the autopsy slides showed pneumoconiosis and that he agreed with that diagnosis, *see* Director's Exhibit 78. It is not clear from the record whether Dr. Hess reviewed the autopsy report, which did not specifically diagnose and/or provide any findings indicating pneumoconiosis, *see* Director's Exhibits 12, 37, or whether he reviewed the autopsy slides or another physician's opinion regarding the miner's autopsy.

to short-term miners is affirmed as supported by substantial evidence.

Finally, the administrative law judge also found that even if the x-ray evidence were sufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1); *Knuckles*, *supra*, the evidence of record from highly qualified physicians, *see Scott*, *supra*; *Wetzel*, *supra*, who reviewed the entire medical record and autopsy evidence, *see Hall*, *supra*, adequately explained that the changes seen on the x-rays were attributable to the miner's heart disease and heart failure and not to coal mine dust inhalation or to the miner's coal mine employment, *see Clark*, *supra*; *Fields*, *supra*; *Lucostic*, *supra*. Thus, the administrative law judge found that entitlement was not established pursuant to Part 718, *see* 20 C.F.R. §§718.201, 718.203(c); *Knuckles*, *supra*; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(on recon. *en banc*)(physician's comments addressing the source of a pneumoconiosis diagnosed by x-ray and/or indicating that the diagnosed pneumoconiosis was not coal workers' pneumoconiosis are to be considered at 20 C.F.R. §718.203); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Inasmuch as the administrative law judge's finding that entitlement was not established pursuant to Part 718, *see* 20 C.F.R. §§718.201; 718.203(c); *Knuckles*, *supra*, is not challenged on appeal, *see Skrack*, *supra*, and is supported by substantial evidence, it is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge