BRB No. 98-1154 BLA

EVELYN STEPHENS (Widow of ANDREW STEPHENS) Claimant-Respondent v. WOLF CREEK COLLIERIES Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	Date Issued: 7/22/99 DECISION and ORDER

Appeal of the Decision and Order - Denial of Request for Modification of Administrative Law Judge Robert L. Hillyard, United States Department of Labor.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for claimant.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Denial of Request for Modification (97-BLA-0904) of Administrative Law Judge Robert L. Hillyard awarding 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] Claimant

[1] The miner died on December 22, 1989. The death certificate stated that the miner died as a result of respiratory failure secondary to pneumonia, due to coal

filed her claim for survivor's benefits on August 25, 1993. In a Decision and Order issued on January 22, 1996, the administrative law judge found that the parties stipulated to thirty-three years of coal mine employment, and based on the filing date, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge found that claimant established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and consequently awarded benefits. *See Brown v. Rock Creek Coal* Co., 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); Director's Exhibit 34 at 64. Employer appealed to the Board on February 8, 1996, but then on March 1, 1996, requested dismissal without prejudice, and further requested that the case be remanded to the district director to proceed with employer's request for modification. On March 13, 1996, the Board issued an Order remanding the case to the district director for consideration of employer's request for modification. Director's Exhibit 34 at 158. The district director denied modification on October 11, 1996. Director's Exhibit 34 at 23. After the case was transferred to the Office of Administrative Law Judges, the administrative law judge found that employer failed to establish a mistake in determination of fact in the previous award pursuant to 20 C.F.R. §725.310(a). Accordingly, employer's request for modification was denied. Employer appeals, contending that the administrative law judge erred in crediting the treating physician. Claimant responds, urging affirmance of the award of benefits. Employer replies, reiterating its previous contentions. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 7.

Employer's only contention on appeal is that the administrative law judge erred in crediting the medical opinion of Dr. Hieronymous as claimant's treating physician. After stating that he reviewed his prior decision, the administrative law judge properly reviewed all newly submitted evidence, which included the medical opinions of Drs. Hieronymous, Kramen, Renn and Castle. *See Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).[2] The administrative law judge determined that Dr. Hieronymous found that the miner's death was due to coal workers' pneumoconiosis or complications thereof, and that the respiratory failure and all other problems that the miner had were probably directly related to his coal workers' pneumoconiosis. Decision and Order at 7; Claimant's Exhibit 1. In his first Decision and Order, the administrative law judge found:

> [T]roubling the fact that Dr. Hieronymous noted the miner as a light smoker with a smoking history of approximately five years. The evidence establishes a smoking history of about fifty years. However, this is not sufficient to discredit Dr. Hieronymous's opinions. Because Dr. Hieronymous treated the miner for over nine years up until his death and there are no contrary medical reports more recent than 1981, I give the most weight to the opinion of Dr. Hieronymous.

Decision and Order at 9. On modification, the administrative law judge again found Dr. Hieronymous entitled to more weight than the other doctors of record, as he was "best suited to make an assessment of the Miner's condition over a period of time." Decision and Order on Modification at 11.

Furthermore, the administrative law judge accorded little weight to Dr. Kramen, who found no evidence that the miner suffered from or died as a result of pneumoconiosis, as he did not examine the miner, and his two letters do not explain the bases for his opinions. Director's Exhibits 30, 31; Decision and Order at 11. As employer fails to challenge the administrative law judge's weighing of Dr. Kramen's opinion, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, the administrative law judge determined that the opinions of Drs. Renn and Castle, who found no coal workers' pneumoconiosis and that coal workers'

[2] The administrative law judge properly found that the only avenue for modification in this award of benefits in a survivor's claim is a mistake in fact. *See Branham v. Bethenergy Mines, Inc.,* 20 BLR 1-27 (1996).

pneumoconiosis did not cause or contribute to death, were entitled to less weight than the opinion of Dr. Hieronymous, because they did not examine the miner. Employer's Exhibits 2, 3.

Employer contends that the administrative law judge erred in crediting the opinion of Dr. Hieronymous, as his report is inaccurate as to the length of smoking history, and that the administrative law judge blindly credited this opinion without examining its substance. Employer also asserts that the administrative law judge refused to consider the merits of the highly qualified physicians, Drs. Renn and Castle, and thereby violated the Administrative Procedure Act (APA). *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). In addition, employer contends that due process was violated, as the opinions of non-examining physicians would be useless in a survivor's claim where there is a treating physician of record. We disagree. The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction of this case lies, has repeatedly held that treating physicians are entitled to greater weight. *See Brown v. Rock Creek Coal Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Although the administrative law judge may discredit the opinion of a treating physician in light of the factors noted by employer, he is not required to do so. *See Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983); *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989). In the instant case, the administrative law judge fully considered the fact that Dr. Hieronymous noted an inaccurate length of smoking history and nonetheless gave adequate grounds for according the opinion greater weight, and therefore committed no error.[3] *See generally Brown, supra; Tussey, supra.* Therefore, we affirm the administrative law judge's decision to accord greater weight to the opinion of Dr. Hieronymous, and affirm his finding that employer failed to establish a mistake in determination of fact. Furthermore, we reject employer's argument that the administrative law judge's decision does not comply with the APA, as the administrative law judge properly addressed the relevant evidence and provided a sufficient rationale for his findings. *See generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[3] Moreover, we reject employer's due process contention, as the United States Court of Appeals for the Sixth Circuit upheld the crediting of a treating physician's opinion under similar circumstances in a survivor's claim in *Brown v. Rock Creek Coal Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Accordingly, the Decision and Order - Denial of Request for Modification of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge