

BRB No. 99-1074 BLA

DELMA LEE SIMMS)	
(Widow of BILLY SIMMS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
)	
SOUTH HOPKINS COAL COMPANY)	DATE ISSUED:
)	
and)	
)	
OLD REPUBLIC INSURANCE 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 - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (98-BLA-0296) of

¹Claimant is the surviving spouse of the miner, who died on October 14, 1996. Director's Exhibit 7. The miner's death certificate, signed by Dr. Taylor, indicates that the immediate cause of the miner's death was "respiratory failure" due to or as a consequence of "COPD." *Id.*

Administrative Law Judge Donald W. Mosser 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). In his Decision and Order, dated June 29, 1999, the administrative law judge considered the instant survivor's claim,² which was filed on December 30, 1996, pursuant to the applicable regulations at 20 C.F.R. Part 718. After crediting the miner with fourteen years of coal mine employment based upon the stipulation of the parties, the administrative law judge determined that, although claimant did not establish that the miner suffered from pneumoconiosis under 20 C.F.R. §718.202(a)(1), (a)(3) and (a)(4), the biopsy evidence of record was sufficient to establish, pursuant to 20 C.F.R. §718.202(a)(2), that the miner suffered from the disease. The administrative law judge further found claimant entitled to the rebuttable presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and found that there was insufficient evidence to rebut the presumption. The administrative law judge then determined, however, that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in crediting the medical opinions of Drs. Branscomb and Fino over the opinions of Drs. Taylor and Younes in finding the evidence insufficient to establish that the miner had pneumoconiosis and that his death was due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.205(c)(2), respectively. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not intend presently to participate in the proceedings on appeal.³

²The miner had filed a claim on April 15, 1985. Director's Exhibit 36. Administrative Law Judge Charles W. Campbell found, in a Decision and Order dated March 21, 1991, that the miner established the elements of entitlement to benefits pursuant to 20 C.F.R. Part 718. *Id.* Judge Campbell reaffirmed his decision awarding benefits in a Decision and Order on Motion for Reconsideration dated May 14, 1991. Employer appealed. The Board affirmed Judge Campbell's finding of entitlement under Part 718, but remanded the case for the fact-finder to determine whether the medical evidence of record established a specific date for the onset of disability. *Simms v. South Hopkins Coal Co., Inc.*, BRB No. 91-1481 BLA (Sept. 21, 1993)(unpublished). In a Decision and Order on Remand dated March 16, 1994, Administrative Law Judge Daniel J. Roketenetz stated that he was unable to determine the onset date from the medical evidence and, consequently, found the date from which benefits commence to be April 1985, the month in which the miner filed for benefits. Director's Exhibit 36. Employer appealed, challenging Judge Campbell's previously affirmed finding of total disability due to pneumoconiosis under 20 C.F.R. §718.204(b) and Judge Roketenetz's determination as to the date from which benefits commence. The Board declined to address employer's argument at Section 718.204(b), as the Board had previously affirmed Judge Campbell's finding that this element of entitlement was established, *see Simms v. South Hopkins Coal Co., Inc.*, BRB No. 91-1481 BLA (Sept. 21, 1993)(unpublished), and affirmed Judge Roketenetz's determination as to the date from which benefits commence. *Simms v. South Hopkins Coal Co., Inc.*, BRB No. 94-2208 BLA (Dec. 21, 1994)(unpublished). Employer did not take any further action in opposition to the award of benefits in the miner's claim.

³We affirm, as unchallenged on appeal, the administrative law judge's findings under 20

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. 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 a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2).⁴ *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

On appeal, claimant first contends that the administrative law judge erred in finding the medical opinion evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Any error the administrative law judge may have made in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) would not constitute prejudicial error, however, since the administrative law judge found the existence of pneumoconiosis established by biopsy evidence pursuant to Section 718.202(a)(2), a finding which is not challenged on appeal.⁵ See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984);

C.F.R. §§718.202(a)(1)-(3), 718.203(b) and Section 718.205(c)(1) and (c)(3). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11-14.

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's last coal mine employment occurred in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 26 at 250.

⁵The administrative law judge found that the biopsy reports of Drs. Cymbala, Hansbarger and

Decision and Order at 12; Director's Exhibit 36. Accordingly, we decline to address claimant's arguments under Section 718.202(a)(4).

Harrison, which support a finding that the miner suffered from simple coal workers' pneumoconiosis, were well-documented and reasoned and, therefore, sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2). Decision and Order at 12; Director's Exhibit 36.

Claimant also contends that the administrative law judge erred in crediting the opinions of Drs. Branscomb and Fino over the opinions of Drs. Taylor and Younes in finding the evidence insufficient to establish that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2). Drs. Branscomb and Fino reviewed the medical evidence of record and opined that the miner did not suffer from pneumoconiosis and that, even assuming that the miner suffered from pneumoconiosis, the disease did not hasten, or contribute in any way to, the miner's death. Employer's Exhibits 1, 2. Drs. Branscomb and Fino attributed the miner's death to chronic obstructive pulmonary disease and respiratory failure from heavy cigarette smoking, which the miner continued up to his death in October 1996.⁶ Dr. Taylor, the miner's treating physician in the months leading up to the miner's death on October 14, 1996, indicated in a letter dated April 30, 1997 that the miner died from respiratory failure due to chronic obstructive pulmonary disease. Director's Exhibit 32. Dr. Taylor further stated in this letter that "[t]here may have been some minimal involvement of coalworker's [sic] pneumoconiosis in [the miner's] lungs," and he indicated that he did not believe that this involvement was a significant contributing factor in the miner's demise. *Id.* In a subsequent letter dated March 30, 1998, Dr. Taylor stated that the inhalation of coal dust for fourteen years "probably contributed to [the miner's] obstructive lung disease and subsequent death." Claimant's Exhibit 1. Dr. Taylor further indicated in deposition testimony that he believed pneumoconiosis contributed to the miner's death, although cigarette smoking was the primary factor in the miner's death. Employer's Exhibit 4 at 10-11. Dr. Younes opined, in a letter dated September 15, 1997 and at a deposition taken April 16, 1998, that the miner had severe pneumoconiosis which was a significant contributing factor in his death. Director's Exhibit 33; Employer's Exhibit 3.

Claimant argues that the administrative law judge should have accorded determinative weight to Dr. Taylor's opinion because Dr. Taylor was the miner's treating physician, while Drs. Branscomb and Fino merely reviewed the medical evidence of record. Claimant suggests that, in this circumstance, the administrative law judge erred in failing to discount the opinions of Drs.

⁶In a report dated February 6, 1998, Dr. Branscomb stated that the miner had a "devastating tobacco addiction," noting that the miner reported in 1985 smoking a pack daily for thirty-eight years, that 1995 hospitalization records reflected that the miner was smoking at least one to two packs per day, and that hospitalization records at the time of the miner's death indicated that the miner was still smoking up to that time. Employer's Exhibit 1. Dr. Fino noted a heavy cigarette smoking history as well in his report dated March 4, 1998, and noted that the miner "continued to smoke up until 1996 when he was so sick from his lungs that he required intubation." Employer's Exhibit 2.

Branscomb and Fino as undocumented and unreasoned. Claimant contends that the administrative law judge further mischaracterized Dr. Taylor's opinion in finding that the doctor appeared to change his opinion. Claimant contends that the administrative law judge thus erred in discounting Dr. Taylor's opinion on that basis. Additionally, claimant argues that the administrative law judge improperly discounted Dr. Younes's opinion on the basis that it was "not very specific or reasoned," and on the basis that the doctor's deposition was "somewhat confusing" as Dr. Younes could not state with certainty that coal dust exposure contributed to the miner's death. Decision and Order at 14.

Claimant's contentions lack merit. Whether a medical opinion is documented and well reasoned is for the administrative law judge as fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Furthermore, while the United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than the opinions of non-treating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16, 24 (6th Cir. 1993), the court subsequently held that its opinion in *Tussey* does not require an administrative law judge to credit the opinion of a treating physician that is flawed. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In weighing the relevant evidence under Section 718.205(c)(2), the administrative law judge duly noted Dr. Taylor's status as the miner's treating physician, but properly discounted the doctor's opinion as unpersuasive on the basis that Dr. Taylor seemed to change his initial opinion, stated in his letter dated April 30, 1997, discussed *supra*. *See Griffith, supra*; *Clark, supra*; *Tackett, supra*; Decision and Order at 14; Director's Exhibit 32; Claimant's Exhibit 1. Contrary to claimant's contention, the administrative law judge's finding that Dr. Taylor appeared to change his initial opinion is supported by substantial evidence. As discussed *supra*, Dr. Taylor indicated in his letter dated April 30, 1997 that the miner possibly had minimal coalworkers' pneumoconiosis, but that this was not a significant contributing factor in the miner's death. Director's Exhibit 32. The administrative law judge reasonably determined that Dr. Taylor changed his opinion in view of a subsequent letter dated March 30, 1998, wherein Dr. Taylor stated that the inhalation of coal dust for fourteen years "probably contributed to [the miner's] obstructive lung disease and subsequent death." Decision and Order at 14; *see Clark, supra*; *Tackett, supra*; Claimant's Exhibit 1.

The administrative law judge also properly discounted Dr. Younes's opinion as unpersuasive, finding that it was "not very specific or reasoned." Decision and Order at 14; *see Clark, supra*; *Tackett, supra*; Employer's Exhibit 3. Contrary to claimant's contention that the administrative law judge mischaracterized Dr. Younes's testimony, the administrative law judge correctly stated that Dr. Younes testified that, although he believes coal dust exposure contributed to the miner's severe obstructive pulmonary disease which caused the miner's death, it is not possible to determine to what degree coal dust exposure was a contributing factor, and there is no way of knowing for certain if coal dust exposure was a contributing factor at all.⁷ Decision and Order at 14; Employer's Exhibit

⁷Dr. Younes testified that the miner could indeed have developed his chronic obstructive pulmonary disease solely from cigarette smoking, and that there "was no way of knowing" whether the miner had developed chronic obstructive pulmonary disease as a result of coal dust exposure.

4 at 18-19. Moreover, the administrative law judge properly credited the opinions of Drs. Branscomb and Fino as “well documented and reasoned” because the doctors fully explained their opinions and the medical evidence of record which they reviewed. *See Clark, supra; Tackett, supra;* Decision and Order at 14; Employer’s Exhibits 1, 2. Contrary to claimant’s suggestion, there is no rule that a non-examining physician’s opinion must be given less weight than an examining or treating physician’s opinion. *See King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We affirm, therefore, the administrative law judge’s finding that claimant failed to establish that pneumoconiosis substantially contributed to the miner’s death pursuant to Section 718.205(c)(2). Inasmuch as we also affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant did not establish that the miner’s death was due to pneumoconiosis under Section 718.205(c)(1) and (c)(3), *see supra*, n.3, we affirm the administrative law judge’s finding that claimant is not entitled to survivor’s benefits. *See 20 C.F.R. §718.205(c); Trumbo, supra; Neeley, supra; Boyd, supra.*

Accordingly, the administrative law judge’s Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Employer’s Exhibit 4 at 18-19.