BRB No. 03-0672 BLA

EVELYN S. PHILLIPS (Widow of FRANK G. PHILLIPS) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY and ACORDIA EMPLOYERS SERVICE Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/22/2004 DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Evelyn S. Phillips, Clintwood, Virginia, *pro se*.[1]

Anne Musgrove and Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

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[1]Ron Carson, program director with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant, but Mr. Carson is not representing claimant on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,[2] without the assistance of counsel, appeals the Decision and Order (02-BLA-5378) of Administrative Law Judge Linda S. Chapman denying benefits on a 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).[3] The administrative law judge credited the miner with at least thirty-nine years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge noted that employer conceded the existence of pneumoconiosis arising out of coal mine employment, Decision and Order at 5; Hearing Transcript at 8, she found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by

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[2]Claimant is the widow of the deceased miner, Frank G. Phillips. Director's Exhibit 3. The miner filed a claim with the Social Security Administration on October 1, 1970. Director's Exhibit 1. After several denials by the Social Security Administration, this claim was transferred to the Department of Labor. *Id*. On July 27, 1982, the Department of Labor found that the miner was entitled to benefits if he ceased working in the mines within a year of its decision. *Id*. The record does not indicate that the miner stopped working within a year of the Department of Labor's July 27, 1982 decision. *Id*. The miner filed another claim with the Department of Labor on May 19, 1987. *Id*. On April 9, 1997, while this claim was pending before the Board on appeal, the miner died. Director's Exhibits 3, 5. This claim was finally denied by Administrative Law Judge Edward Terhune Miller on December 12, 2000. Director's Exhibit 1. Judge Miller's denial of benefits was affirmed by the Board. *Phillips v. Clinchfield Coal Co.*, BRB No. 00-0237 BLA (Dec. 12, 2000)(unpub.). Claimant filed a survivor's claim on June 11, 2001. Director's Exhibit 3.

[3]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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). As the instant claim was filed after the effective date of the amended regulations, all citations to the regulations refer to the amended regulations.

[4]Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[5] *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. *See* 20 C.F.R. §718.202(a)(1)-(4); *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. *See* 20 C.F.R. §718.203; *Boyd*, 11 BLR at 1-40-41.

In finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge considered an autopsy report rendered by Dr. Abrenio, a death certificate signed by Dr. Vanover, and medical reports rendered by Drs. Caffrey, Castle, Perper, Tomashefski and Vanover. The administrative law judge correctly stated that "[t]he only physician who has indicated that pneumoconiosis contributed to [the miner's] death is Dr. Vanover, his treating physician." Decision and Order at 11. In the autopsy report, Dr. Abrenio did not render an opinion with respect to the issue of death due to pneumoconiosis. Director's Exhibit 6.

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[5]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 establishes that pneumoconiosis was the cause of the miner's death, 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.
> ...
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

With regard to the medical reports, Drs. Caffrey, Castle, Perper and Tomashefski opined that pneumoconiosis did not contribute to the miner's death, Director's Exhibits 1, 16; Employer's Exhibits 1, 2, while Dr. Vanover opined that pneumoconiosis contributed to the miner's death, Director's Exhibit 17. Although Dr. Vanover, in the death certificate, listed cardiopulmonary arrest due to pneumonia and disseminated kidney cancer, she also listed pneumoconiosis as a significant condition contributing to the miner's death. Director's Exhibit 5. The administrative law judge permissibly discredited Dr. Vanover's opinion because it is not reasoned and documented. *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). Based on her consideration of Dr. Vanover's opinion, the administrative law judge stated:

> Dr. Vanover did not offer any explanation or rationale for her conclusion, in her two brief letters, that pneumoconiosis was a significant contributing factor to [the miner's] death. She was aware that pneumoconiosis had been found on autopsy, but she did not explain her reasoning for concluding that it hastened [the miner's] death. She did not point to any objective studies or findings, or address the normal pulmonary function and arterial blood gas results obtained before [the miner's] diagnosis of kidney cancer.

Decision and Order at 11. The administrative law judge also noted that "[Dr. Vanover's] opinions are contradicted by her statements that, up until his diagnosis of kidney cancer, [the miner] was in excellent health, and was able to walk four miles a day." *Id*.

The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

Further, although the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recognized that the opinions of treating and examining physicians deserve special consideration, the court has held that there is no rule that a treating

or examining physician must be accorded greater weight than the opinions of other physicians. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). In this case, although the administrative law judge considered Dr. Vanover's status as the miner's treating physician, she did not specifically consider Dr. Vanover's opinion in light of the criteria provided in 20 C.F.R. §718.104(d). Nonetheless, since the administrative law judge permissibly discredited Dr. Vanover's opinion because it is not reasoned and documented, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294, we hold that any error by the administrative law judge in this regard is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Since the administrative law judge permissibly discredited the only medical opinion of record that could support a finding that pneumoconiosis contributed to the miner's death, 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).

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, *Trumbo*, 17 BLR at 1-87; *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.

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