BRB Nos. 11-0524 BLA
and 11-0524 BLA-A

RUTH McKEE (Widow of MARION McKEE) Claimant-Petitioner Cross-Respondent v. PAT WHITE FUELS, INCORPORATED and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND, C/O ALTERNATIVE CONCEPTS Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/22/2012 DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Denial of Benefits of Larry W. Merck, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Second Remand – Denial of Benefits (2004-BLA-5091) of Administrative Law Judge Larry W. Merck (the administrative law judge) with respect to a survivor's claim[1] filed on June 11, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for a third time.[3] In its most recent decision, the Board affirmed the administrative law judge's

[1] Claimant is the widow of the miner, Marion McKee, who died on March 2, 2001. Director's Exhibit 7.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 3.

[3] In the Board's initial decision, it vacated the denial of benefits issued by Administrative Law Judge Daniel J. Roketenetz, holding that Judge Roketenetz did not consider the evidence relevant to the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *McKee v. Pat White Fuels, Inc.*, BRB No. 05-0402 BLA, slip op. at 4 (Feb. 21, 2006)(unpub.). The Board also vacated Judge Roketenetz's findings at 20 C.F.R. §718.205(c), based on errors in his weighing of the medical opinion evidence, and because he did not consider the treating physicians' opinions in light of the factors in 20 C.F.R. §718.104(d)(5). *Id*. at 5-7. However, the Board affirmed, as unchallenged, Judge Roketenetz's finding that claimant established simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203. *Id*. at 2 n.2. Pursuant to employer's Motion for Reconsideration, the Board additionally remanded the case for Judge Roketenetz to determine whether employer waived the issue of collateral estoppel and to consider whether good cause existed to submit evidence exceeding the evidentiary limitations of 20 C.F.R. §725.414. *McKee v. Pat White Fuels, Inc.*, BRB No. 05-0402 BLA, slip op. at 2-6 (Dec. 20, 2006)(unpub. Decision and Order on Recon.). Because Judge Roketenetz was no longer available, the case was reassigned to Administrative Law Judge Larry W. Merck (the administrative law judge).

determination that employer waived its argument that the doctrine of collateral estoppel prevented claimant from relitigating the issue of the existence of complicated pneumoconiosis. *R.M.* [*McKee*] *v. Pat White Fuels, Inc.*, BRB No. 08-0267 (Dec. 19, 2008)(unpub.). However, the Board vacated the award of benefits and remanded the case for the administrative law judge to reconsider whether employer established good cause to admit evidence exceeding the limitations set forth in 20 C.F.R. §725.414. In addition, the Board vacated the administrative law judge's findings at 20 C.F.R. §718.304 and instructed the administrative law judge to reconsider whether claimant established that the miner suffered from complicated pneumoconiosis.

On remand, the administrative law judge found that employer did not establish good cause to exceed the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge also determined that claimant did not establish that the miner had complicated pneumoconiosis at 20 C.F.R. §718.304, or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Therefore, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge did not properly weigh the medical opinions relevant to the cause of the miner's death under 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief on the merits.

In employer's cross-appeal, it asserts that the administrative law judge erred in ruling that Dr. Fino relied upon inadmissible evidence in concluding that pneumoconiosis did not play a role in the miner's death. Claimant responds and argues that the administrative law judge properly gave little weight to Dr. Fino's opinion. The Director also responds and contends that the administrative law judge permissibly determined that employer did not establish good cause for admitting evidence in excess of the evidentiary limitations at 20 C.F.R. §725.414.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant did not establish that the miner had complicated pneumoconiosis at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibits 1, 4. Accordingly, the Board will apply the law of the

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

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, where the presumption in amended Section 411(c)(4) is not available, death will be considered due to pneumoconiosis if claimant establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), cert denied, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Regarding the issue of death causation at 20 C.F.R. §718.205(c), the administrative law judge gave less weight to the opinions of Drs. Turner and Vaezy, that pneumoconiosis was a substantially contributing cause of the miner's death, despite their status as the miner's treating physicians, because he found that their opinions were not reasoned or documented. Decision and Order on Second Remand at 13-16. The administrative law judge also gave less weight to Dr. Fino's opinion, that pneumoconiosis contributed to the miner's death, because he determined that it was based on evidence that he previously concluded was outside of the record and he was unable to determine the extent to which Dr. Fino relied on this evidence. *Id*. at 17. The administrative law judge further noted that he gave little weight to the miner's hospitalization and treatment records because they did not "contain a reasoned medical opinion" on the cause of death. *Id*. at 18. However, the administrative law judge gave "full probative weight" to the opinion of Dr. Westerfield, that the miner's death was due to metastatic lung cancer and not coal dust exposure, because he found that it was based on objective medical evidence and was well-reasoned and well-documented. *Id*. at 16-17. Therefore, the administrative law judge concluded that claimant did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and denied benefits. *Id*. at 18.

United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Claimant contends that the opinions of Drs. Turner and Vaezy, the miner's treating physicians, were sufficient to establish that coal workers' pneumoconiosis was a substantially contributing cause of the miner's death, as they frequently examined and treated him, and Dr. Turner listed pneumoconiosis as a contributing cause of death on the death certificate. Claimant acknowledges that recent case law establishes that the opinions of treating physicians are not necessarily entitled to greater weight, but argues that this precedent "probably does not even apply to this case," as it was issued after the date that the survivor's claim was filed. Claimant's Brief at 5, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Additionally claimant argues that even if this case law applies, in subsequent decisions, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has endorsed giving deference to the opinions of treating physicians. Claimant's Brief at 5, *citing Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Glen Coal Co. v. Director, OWCP* [*Seals*], 77 Fed.Appx. 878, 2003 WL 22389667 (6th Cir. 2003). Finally, claimant contends that the administrative law judge erred in crediting the opinion in which Dr. Westerfield ruled out any connection between pneumoconiosis and the miner's death.

Claimant's arguments regarding the administrative law judge's consideration of the opinions of Drs. Turner and Vaezy are without merit. As claimant concedes, the administrative law judge was not required to accord greater weight to the opinions of Drs. Turner and Vaezy, based upon their status as treating physicians. Rather, the Sixth Circuit held in *Williams* that "the opinions of treating physicians get the deference they deserve, based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647. Despite claimant's argument to the contrary, the fact that the court issued its decision in *Williams* after the survivor's claim was filed does not preclude its application in this case, as it was issued before the survivor's claim was adjudicated.[6] More importantly, the Sixth Circuit's holding did not represent a change in law but, rather, an explication of the longstanding principle that the opinions of treating physicians must be reasoned and documented. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In addition, claimant is incorrect in alleging that, in decisions issued by the Sixth Circuit subsequent to *Williams*, the court has endorsed according greater weight to a medical opinion solely based on the author's status as a treating physician. In the cases cited by claimant, the Sixth Circuit reiterated the principle that, although there are circumstances under which a physician's opinion is entitled to additional weight, based on the

[6] The formal hearing in this case was held on September 15, 2004, and the initial Decision and Order denying benefits was issued on January 11, 2005.

physician's experience treating the miner, the conclusions set forth in the opinion must be reasoned and documented. *Odom*, 342 F.3d at 491, 22 BLR at 2-621; *Seals*, 77 Fed.Appx. at 886.

In this case, the administrative law judge evaluated the opinions of Drs. Turner and Vaezy at 20 C.F.R. §718.104(d), which sets forth the factors relevant to determining the weight to accord to the miner's treating physician, but rationally determined that the opinions of Drs. Turner and Vaezy were not entitled to deference on this basis. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Odom*, 342 F.3d at 491, 22 BLR at 2-621; Decision and Order on Second Remand at 13-16. The administrative law judge rationally gave little weight to Dr. Turner's identification of pneumoconiosis as a contributing cause of death on the death certificate, as the administrative law judge permissibly found that Dr. Turner did not identify the basis for his conclusion. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order on Second Remand at 13. The administrative law judge also acted within his discretion in according little weight to Dr. Turner's subsequent opinion, expressed in written responses to a questionnaire, as he did not adequately explain his determination that pneumoconiosis was a contributing cause of death or identify the documentation that supported his finding. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Second Remand at 14-15. Similarly, the administrative law judge rationally determined that Dr. Vaezy's opinion, that pneumoconiosis hastened the miner's death, was entitled to little weight, as Dr. Vaezy did not cite to any objective medical evidence to support his conclusion. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order on Remand at 16. We affirm, therefore, the administrative law judge's discrediting of the opinions of Drs. Turner and Vaezy at 20 C.F.R. §718.205(c).

Claimant bears the burden of proving, by a preponderance of the evidence that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). *See Trumbo*, 17 BLR at 1-87-88. Because we have affirmed the administrative law judge's determination that the opinions of Drs. Turner and Vaezy, the only evidence supportive of claimant's burden, were not adequately documented and reasoned, we affirm the administrative law judge's finding that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[7]

[7] Based on our affirmance of the administrative law judge's finding that claimant did not satisfy her burden under 20 C.F.R. §718.205(c), it is unnecessary to address claimant's arguments regarding the administrative law judge's consideration of Dr. Westerfield's opinion, that pneumoconiosis played no role in the miner's death. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In light of our affirmance of the administrative law judge's finding that claimant did not establish that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c), an essential element of entitlement, we also affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. We need not address, therefore, employer's cross-appeal.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge