

BRB No. 95-0442 BLA

MILDRED HURLEY)	
(Widow of ALEXANDER HURLEY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
McCOY-ALMA COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Donna A. Balaguer (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (86-BLA-4098) of Administrative Law Judge J. Michael O'Neill denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

¹ Claimant is Mildred Hurley, widow of the miner, Alexander Hurley, who died on June 5, 1980. Director's Exhibit 9. Claimant filed the present application for benefits on May 31, 1984. Director's Exhibit 1.

of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In *Hurley v. McCoy-Alma Coal Co.*, BRB No. 88-0597 BLA (Nov. 25, 1992)(unpub.), the Board reversed the administrative law judge's dismissal of this survivor's claim pursuant to 20 C.F.R. §725.309(d), holding that the administrative law judge erred in applying the duplicate claim provision when employer failed to raise the issue until the hearing. *Hurley*, slip op. at 2-3; see *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989). Accordingly, the Board remanded the case for consideration of the merits.

On remand, the administrative law judge credited the miner with twenty-four years of coal mine employment, found employer to be the responsible operator, and concluded that the evidence was insufficient to establish death due to pneumoconiosis.² Decision and Order on Remand at 4, 14-15; 20 C.F.R. §718.205; see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge failed to accord proper weight to the opinion of the miner's treating physician that the miner's death was due in part to pneumoconiosis. Claimant's Brief at 2. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.³

² The administrative law judge found well-reasoned and documented the opinions of those physicians who concluded that the miner died due to lymphoma and complications resulting from chemotherapy, all of which they opined were unrelated to pneumoconiosis. Decision and Order on Remand at 14-15; Director's Exhibits 52, 56, 59; Employer's Exhibits 2, 17, 21, 22, 52.

³ We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and responsible operator status. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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).

Claimant contends that the administrative law judge failed to accord sufficient weight to the opinion of the miner's treating physician, Dr. Hess. Claimant's Brief at 2.

In weighing the medical opinion evidence, an administrative law judge must expressly consider a physician's status as a treating physician, *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), but there is no *per se* rule that a treating physician's opinion must be accorded the greatest weight, *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995)(administrative law judge permissibly accorded less weight to treating physician's opinion found to be equivocal); *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992). Here, the administrative law judge explicitly considered Dr. Hess' status as the miner's treating physician, but provided valid reasons for according less weight to his opinion. Decision and Order on Remand at 14

The administrative law judge permissibly credited as well-reasoned and documented Dr. Anderson's contrary opinion criticizing Dr. Hess' conclusions as not based on objective evidence of pneumoconiosis.⁴ Decision and Order on Remand at 14; Director's Exhibit 59; 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); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge then weighed Dr. Hess' report against the "overwhelmingly negative" opinions of the physicians

⁴ Dr. Hess opined that pneumoconiosis contributed to the miner's pulmonary failure, although lymphoma and its complications were the main cause. Director's Exhibit 42. Dr. Anderson stated that Dr. Hess' opinion was unreliable because the information upon which Dr. Hess relied was gathered during the miner's final hospitalization, when he was in a near-terminal state from his advanced malignant lymphoma and an adverse reaction to chemotherapy. Director's Exhibit 59 at 3-4. In Dr. Anderson's view, the miner's deteriorated condition greatly compromised the accuracy of the testing, the results of which Dr. Hess, a hematologist, had misinterpreted as indicative of a pulmonary impairment due to pneumoconiosis. *Id.* The administrative law judge also found that two earlier opinions by Dr. Hess did not address death due to pneumoconiosis. Director's Exhibits 11, 42.

who concluded that the miner's death was due solely to lymphoma and its complications, and found Dr. Hess' opinion insufficient to establish death due to pneumoconiosis. Decision and Order on Remand at 15. We hold that the administrative law judge adequately considered Dr. Hess' status as a treating physician and permissibly declined to accord his opinion determinative weight under these circumstances. See *Griffith, supra*; *Tussey, supra*; *Berta, supra*.

Claimant generally asserts that the evidence establishes that the miner's death was due to pneumoconiosis. Claimant's Brief at 2-4. Claimant offers no specific legal or factual challenge to the administrative law judge's findings. Because claimant fails to state with specificity why the administrative law judge's conclusions are unsupported by substantial evidence, are irrational, or are contrary to law, the Board has no basis upon which to review these findings. See 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); see also *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Therefore, we affirm the administrative law judge's finding that the evidence is insufficient to establish entitlement pursuant to Section 718.205, see *Brown, supra*, inasmuch as the Board is not empowered to reweigh the evidence.⁵ See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S.
DOLDER

⁵ In view of our disposition of this case, we decline to address employer's contention regarding the applicability of 20 C.F.R. §725.309(d).

Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge