BRB Nos. 06-0957 BLA
and 06-0957 BLA-A

B.H. (Widow of H.H.) Claimant-Respondent Cross-Petitioner v. JOHNSON COAL COMPANY, INCORPORATED Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/27/2007 DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals and claimant cross-appeals the Decision and Order (04-BLA-0053)[1] of Administrative Law Judge Joseph E. Kane 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). The administrative law judge accepted the parties' stipulations that the miner had twenty-four years of coal mine employment, and had coal workers' pneumoconiosis arising out of coal mine employment. Decision and Order at 4; 2003 Hearing Transcript at 13. The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded survivor's benefits to commence on December 1, 2000, and to cease on January 31, 2003, the month before the month in which claimant remarried. In addition, the administrative law judge awarded augmented survivor's benefits on behalf of claimant's son, to commence on December 1, 2000, and to cease on July 30, 2004, the month before her son became eighteen years of age.

Both claimant[2] and employer filed requests for reconsideration. By Order dated August 22, 2006, the administrative law judge denied claimant's request for reconsideration, on the ground that there was no evidence in the current record that showed that claimant's son was a continuing student or a disabled adult survivor. Because claimant submitted new evidence on reconsideration on the issue of dependency, the administrative law judge ordered claimant to show cause why her request for reconsideration should not be treated as a request for modification. The administrative law judge also denied employer's request for reconsideration, because he continued to agree with his prior decision to award benefits. By Order dated September 11, 2006, the administrative law judge determined that claimant's survivor's claim was final because claimant stated that she did not seek modification.

On appeal, employer challenges the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). Claimant responds, urging affirmance of the administrative law judge's award of benefits. On cross-appeal, claimant asserts that the administrative law judge

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[1] The prior case number was 03-BLA-5625.

[2] Claimant is the widow of the deceased miner. The miner filed four claims for benefits, all of which were denied. Director's Exhibit 1. The miner's most recent claim was finally denied on March 29, 2000. *Id.* The miner died on December 26, 2000. Director's Exhibit 10. Claimant filed a survivor's claim on February 23, 2001. Director's Exhibit 3.

erred in refusing to extend the award of augmented survivor's benefits on behalf of claimant's son after he became eighteen years old, on the ground that her son qualified as a disabled adult child. In response to claimant's cross-appeal, employer asserts that the administrative law judge did not err by refusing to consider new evidence on reconsideration. Employer also asserts that the Board lacks jurisdiction to consider claimant's assertion that her son was entitled to survivor's benefits in his own right as a disabled adult child, because only claimant's survivor's claim was before the administrative law judge. Further, employer asserts that the award of augmented benefits on behalf of claimant's son had to cease as of January 31, 2003, absent a separate claim for dependent benefits by claimant's son. The Director, Office of Workers' Compensation Programs (the Director), asserts that the administrative law judge erred in extending the award of augmented survivor's benefits on behalf of claimant's son until August 1, 2004, because claimant became ineligible for these benefits when she remarried on February 5, 2003. However, the Director notes that claimant's son may file a claim for benefits as the survivor of the deceased miner.[3]

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 into the Act by 30 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, 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. §§718.3, 718.202, 718.203, 718.205(a); *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). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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[3] Claimant filed a brief in reply to the response briefs of employer and the Director, Office of Workers' Compensation Programs, reiterating her prior contentions regarding the issue of dependency.

At Section 718.205(c)(2), the administrative law judge considered the death certificate signed by Dr. Koura, and the reports of Drs. Koura, Westerfield, and Caffrey.[4] In the death certificate, Dr. Koura opined that emphysema, arterial insufficiency and blockage, and coal workers' pneumoconiosis were the causes of the miner's death. Director's Exhibit 10. In reports dated December 13, 2001 and September 10, 2003, Dr. Koura opined that pneumoconiosis was a factor contributing to or hastening the miner's death. Claimant's Exhibits 2, 4. By contrast, in reports dated September 10, 2001 and October 20, 2003, Dr. Westerfield opined that simple coal workers' pneumoconiosis did not cause or contribute to the miner's death. Director's Exhibit 10A; Employer's Exhibit 1. In a report dated July 6, 2001, Dr. Caffrey opined that the miner's death was due to acute diffuse pneumonia with focal necrotizing pneumonia. Employer's Exhibit 1. Further, in a supplemental report dated October 7, 2003, Dr. Caffrey opined that simple coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer's Exhibit 2.

The administrative law judge discredited the opinions of Drs. Westerfield and Caffrey because they were contrary to the spirit of the Act. Decision and Order at 7. The administrative law judge found that Dr. Koura's opinion established that the miner's pneumoconiosis contributed to his death, based upon the administrative law judge's findings that Dr. Koura's opinion was adequately supported and explained, and was not contradicted by the reports of Drs. Westerfield and Caffrey. *Id*.

Employer asserts that the administrative law judge erred in discrediting Dr. Westerfield's opinion. The administrative law judge found that Dr. Westerfield's opinion, that pneumoconiosis did not contribute to the miner's death, was based on the statement that simple pneumoconiosis does not cause death and does not predispose an individual to death from other causes. Decision and Order at 7. Hence, the administrative law judge discredited Dr. Westerfield's opinion, on the ground that it was contrary to the spirit of the Act. *Id*. In a report dated September 10, 2001, Dr. Westerfield expressly stated that "[s]imple [c]oal [w]orkers' [p]neumoconiosis does not cause death and does not predispose an individual to death from other causes." Director's Exhibit 10A. Dr. Westerfield also noted medical literature that failed to detect an increase in mortality from simple pneumoconiosis. *Id*. In a subsequent report dated October 20, 2003, Dr. Westerfield stated that he found no evidence of record that coal workers' pneumoconiosis contributed to the miner's death. Employer's Exhibit 1.

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[4] The administrative law judge also considered the medical treatment records of Whitesburg Area Regional Hospital from 1994 to 2000, and the medical treatment records of Hazard Kentucky Area Regional Hospital from October 16, 2000, to December 26, 2000.

In *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that a physician's belief that simple pneumoconiosis is never disabling may constitute grounds for rejecting his opinion as inconsistent with the spirit of the Act. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72. Nonetheless, the court observed that even a physician's belief that simple pneumoconiosis cannot be totally disabling does not automatically exclude from consideration the physician's otherwise probative testimony regarding the existence or severity of a miner's disability. *Id*. Rather, the court held that the physician must foreclose the possibility that simple pneumoconiosis can be totally disabling before his opinion will be considered inconsistent with the spirit of the Act. *Id*.

In the instant case, Dr. Westerfield stated that simple coal workers' pneumoconiosis does not cause death and does not predispose an individual to death from other causes. Director's Exhibit 10A. Dr. Westerfield offered no additional basis for his conclusion that pneumoconiosis did not contribute to the miner's death. *Id*. Thus, because Dr. Westerfield's opinion was primarily based on a predisposed belief that foreclosed all possibility that simple pneumoconiosis contributed to the miner's death, the administrative law judge reasonably found that Dr. Westerfield's opinion was contrary to the spirit of the Act. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72. Consequently, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Westerfield's opinion.

Employer also asserts that the administrative law judge erred in discrediting Dr. Caffrey's opinion. The administrative law judge stated that "Dr. Caffrey stated he agreed with Dr. Westerfield's reasons for concluding that pneumoconiosis did not contribute to the miner's death." Decision and Order at 7. The administrative law judge therefore stated, "since both physicians based their conclusions on medical assumptions which are contrary to or in conflict with the spirit and purposes of the Act, I have discredited the opinions of Drs. Westerfield and Caffrey regarding their findings on whether the miner's simple coal workers' pneumoconiosis contributed to his death." *Id*. In an October 7, 2003 report, Dr. Caffrey stated that he completely agreed with and relied on the reasons enumerated in Dr. Westerfield's September 10, 2001 report in concluding that simple pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer's Exhibit 2. As discussed *supra*, the only reason provided by Dr. Westerfield for his conclusion that pneumoconiosis did not contribute to the miner's death was that simple coal workers' pneumoconiosis does not cause death and does not predispose an individual to death from other causes. Director's Exhibit 10A. Thus, because Dr. Caffrey's opinion was primarily based on a predisposed belief that foreclosed all possibility that simple pneumoconiosis contributed to the miner's death, the administrative law judge reasonably found that Dr. Caffrey's opinion was contrary to the spirit of the Act. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72. Consequently, we reject

employer's assertion that the administrative law judge erred in discrediting Dr. Caffrey's opinion.

Our dissenting colleague believes the case should be remanded for the administrative law judge to determine whether Dr. Caffrey's opinion that pneumoconiosis did not contribute to the miner's death was based on a consideration other than the predisposed belief he shares with Dr. Westerfield that "[s]imple [c]oal [w]orkers' [p]neumoconiosis does not cause death and does not predispose an individual to death from other causes." Director's Exhibit 10A. Our dissenting colleague points to Dr. Caffrey's statements that the miner's pulmonary problems were due entirely to tobacco abuse and that he would have expired at the same time if he had never worked in the mines. The doctor provided no explanation for his determination that the miner's twenty-four years of coal mine employment and simple coal workers' pneumoconiosis did not contribute to or aggravate the miner's pulmonary problems. The only rationale for his opinion which can be gleaned from his report is the belief stated by Dr. Westerfield which Dr. Caffrey stated he "completely agree[s] with." Employer's Exhibit 2. Accordingly, the administrative law judge properly discredited Dr. Caffrey's opinion together with Dr. Westerfield's.

Employer further asserts that Dr. Koura's opinion was not well-reasoned and well-documented. As noted above, the administrative law judge found that "Dr. Koura's opinion is sufficient to establish [that] the miner's pneumoconiosis contributed to his death under the provisions of subsection 718.205(c)(2)." Decision and Order at 7. Before an administrative law judge can rely on a medical opinion, he must first determine whether the medical opinion is documented and reasoned. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1983). In this case, the administrative law judge acknowledged that Dr. Koura did not provide an extensive discussion of the basis for his opinion that pneumoconiosis contributed to the miner's death. Decision and Order at 6, 7. However, the administrative law judge stated that "Dr. Koura's finding that pneumoconiosis worsened the miner's condition is supported by the consistent diagnosis of and treatment for pneumoconiosis in the hospital records." *Id*. at 7. The administrative law judge additionally stated that "[Dr. Koura] did state the presence of pneumoconiosis was confirmed on autopsy findings and he further stated pneumoconiosis worsened the miner's condition and decreased his chance for recovery." *Id*. Further, the administrative law judge stated that "Dr. Koura provided a minimal explanation for the basis for his opinion that pneumoconiosis contributed to or hastened the miner's death." *Id*. Thus, while the administrative law judge did not find that Dr. Koura's opinion was well-reasoned, he reasonably found that it was adequately supported and explained to carry claimant's burden of establishing that the miner's death was due to pneumoconiosis, considering that it was not contradicted after he had discredited the opinions of Drs. Westerfield and Caffrey. *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). Consequently, we reject

employer's assertion that the administrative law judge erred in relying on Dr. Koura's opinion in finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2).

Employer additionally asserts that "Dr. Koura's status as one of [the miner's] 'treating physicians' does not justify blindly crediting his findings." Employer's Brief at 12. The administrative law judge stated that "Dr. Koura was the miner's treating physician during his last three hospitalizations in October and December, 2000." Decision and Order at 6. Hence, the administrative law judge stated that "[t]he opinions of Dr. Koura must, therefore, be considered pursuant to §718.104(d)." *Id*.

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."[5] 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). Although 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).

The Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "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. In the instant case, the administrative law judge did not credit Dr. Koura's opinion over the contrary opinions of Drs. Westerfield and Caffrey.[6] Rather, the administrative law judge discredited the opinions of Drs. Westerfield and Caffrey, and then found that Dr. Koura's opinion was adequately supported and explained to carry claimant's burden of establishing that the miner's death was due to pneumoconiosis. Decision and Order at 7.

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[5] The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations.

[6] Dr. Koura is Board-eligible in pulmonary medicine, while Dr. Caffrey is Board-certified in pathology and Dr. Westerfield is Board-certified in pulmonary medicine.

Although the administrative law judge correctly stated that Dr. Koura was entitled to consideration under 20 C.F.R. §718.104(d)(5) as the miner's treating physician, he did not do so. *Id*. Nonetheless, because substantial evidence supports the administrative law judge's finding that Dr. Koura's opinion established that the miner's death was due to pneumoconiosis at Section 718.205(c), we hold that any error by the administrative law judge in failing to specifically consider Dr. Koura's opinion pursuant to the criteria set forth in Section 718.104(d) was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2).

Finally, claimant asserts, on cross-appeal, that the administrative law judge erred in refusing to extend the award of augmented survivor's benefits on behalf of her son after he became eighteen years old. Specifically, claimant argues that her son qualified as a disabled adult child and was entitled to receive benefits as long as he remained disabled. The administrative law judge found that claimant was entitled to both survivor's benefits and augmented survivor's benefits on behalf of her son, and ordered that they commence on December 1, 2000, the beginning of the month that the miner died. However, while the administrative law judge ordered claimant's survivor's benefits to cease on January 31, 2003, the month before the month in which claimant remarried, the administrative law judge ordered claimant's augmented survivor's benefits on behalf of her son to cease on July 30, 2004, the month before the month that claimant's son became eighteen years of age.[7]

Section 725.213(b) provides that the last month that an individual is entitled to benefits as a surviving spouse is the month before the month in which the surviving spouse marries or dies. *See* 20 C.F.R. §725.213(b)(1), (2). Claimant's son did not file a claim for survivor's benefits as a dependent child of the deceased miner. *See* 20 C.F.R. §§725.218, 725.219, 725.220, 725.221. Claimant's entitlement to augmented survivor's benefits on behalf of her son was based on the survivor's claim that she filed on February 23, 2001. Director's Exhibit 3; *see* 20 C.F.R. §§725.212 and 725.213(a). Because claimant remarried on February 5, 2003, and thereby became ineligible to receive survivor's benefits, the administrative law judge erred in ordering claimant's augmented

[7] The administrative law judge stated that "although the miner's child may be entitled to benefits as a disabled adult child, the record does not include documentation sufficient to find such status established in this case." Decision and Order at 8.

survivor's benefits to cease on July 30, 2004, as opposed to January 31, 2003, the month before the month in which claimant remarried.[8] *See* 20 C.F.R. §725.213(b)(1).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY,
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's award of benefits. As I believe that substantial evidence does not support the administrative law judge's finding, I would vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), and remand the case for further consideration of all the evidence thereunder. In finding that Dr. Koura's opinion was adequately supported and explained to carry claimant's burden of establishing that the miner's death was due to

[8] Claimant also asserts that the administrative law judge erred in failing to review post-hearing evidence that showed that claimant's son qualified for disability benefits from the miner's Social Security Administration earnings. In view of our holding that the administrative law judge erred in ordering claimant's augmented survivor's benefits to continue after January 31, 2003, the month before the month that claimant remarried, *see* 20 C.F.R. §725.213(b)(1), we decline to address claimant's assertion that the administrative law judge erred in failing to consider post-hearing evidence regarding her son's disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

pneumoconiosis at Section 718.205(c)(2),[9] the administrative law judge noted that Dr. Koura's opinion was not contradicted by the opinions of Drs. Westerfield and Caffrey,[10] which he had discredited. Decision and Order at 7. While I agree with the majority that the administrative law judge permissibly discredited Dr. Westerfield's opinion, on the ground that it was contrary to the spirit of the Act, I would hold that employer's assertion that the administrative law judge erred in discrediting Dr. Caffrey's opinion has merit. As the majority notes, the only reason that Dr. Westerfield gave for concluding that pneumoconiosis did not contribute to the miner's death was his belief that simple coal workers' pneumoconiosis does not cause death and does not predispose an individual to death from other causes. Director's Exhibit 10A. Dr. Caffrey stated that he agreed with and relied on Dr. Westerfield's reasons for opining that pneumoconiosis did not contribute to the miner's death. Employer's Exhibit 2. However, Dr. Caffrey also stated that it was *important* to note that the miner's pulmonary problems were due to tobacco abuse. *Id*. Dr. Caffrey further stated that "[w]ith the [miner's] history of smoking which is recorded here, he in all likelihood would have expired from complications of tobacco abuse at the same time, whether or not he ever worked in the coal mines." *Id*. In considering Dr. Caffrey's opinion, the administrative law judge focused on the fact that Dr. Caffrey agreed with Dr. Westerfield's reasons for opining that pneumoconiosis did not contribute to the miner's death. The administrative law judge did not consider whether Dr. Caffrey's opinion was based on a reason other than Dr. Westerfield's predisposed belief. Consequently, I would hold that the administrative law judge erred in discrediting Dr. Caffrey's opinion, on the ground that it is contrary to the spirit of the Act. *See Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987). Therefore, I would vacate the administrative law judge's finding that the evidence

[9] Dr. Koura opined that pneumoconiosis was a factor contributing to or hastening the miner's death. Claimant's Exhibits 2, 4.

[10] Drs. Westerfield and Caffrey opined that simple coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. Director's Exhibit 10A; Employer's Exhibits 1, 2.

established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), and remand the case for further consideration.[11]

I agree with the majority opinion in all other respects.

ROY P. SMITH
Administrative Appeals Judge

[11] The administrative law judge noted Dr. Westerfield's statements regarding Dr. Caffrey's review of lung slides that were taken on July 6, 2001. However, the administrative law judge did not expressly consider Dr. Caffrey's July 6, 2001 report. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).