BRB Nos. 07-0485 BLA
and 07-0526 BLA

J.O. (Widow of and o/b/o S.O.) Claimant-Petitioner v. WHITAKER COAL CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2008 DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits and Decision and Order Denying Request for Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-BLA-00147) and the Decision and Order Denying Request for Modification (2004-BLA-06616) of Administrative Law Judge Alice M. Craft with respect to a miner's claim and 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).[1] In her Decision and Order concerning the miner's claim, Judge Craft (the administrative law judge) credited the miner with at least thirty years of coal mine employment and noted that the case presented a request for modification of a denial of benefits.[2] The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(2), (a)(4) and 718.203(b) and, therefore, a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge further found, however, that the evidence did not establish that the miner had a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge determined that although claimant established that the miner was suffering from pneumoconiosis arising out of coal mine employment, pneumoconiosis did not cause, contribute to, or hasten the miner's death pursuant to 20 C.F.R. §718.205(c). She denied benefits, therefore, in the survivor's claim.

In a combined brief addressing both denials, claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to

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[1] We have consolidated for decision claimant's appeals of the denials of benefits in the miner's claim and the survivor's claim.

[2] The miner filed an application for benefits on November 15, 1996. Director's Exhibit 1. In a Decision and Order dated January 5, 1999, Administrative Law Judge Daniel Roketenetz denied benefits because the miner did not establish that he had pneumoconiosis or that he was suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 35. The Board affirmed the denial of benefits on August 31, 2000. *[S.O.] v. Whitaker Coal Corp.*, BRB No. 99-0389 BLA (Aug. 31, 2000)(unpub.); Director's Exhibit 46. The miner filed a second application for benefits on May 15, 2001, that, after several procedural rulings, was treated as request for modification of the denial of benefits in the November 15, 1996 claim. Director's Exhibits 48, 50, 53, 119. The miner died on November 30, 2002. Director's Exhibit 58. Claimant, the miner's widow, filed an application for survivor's benefits on May 19, 2003, and continued to pursue the miner's claim on behalf of his estate.

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The amended version of 20 C.F.R. §725.310 does not apply in cases, such as the present one, in which the claim was pending on the effective date of the new regulations.

Sections 718.204(b)(2) and 718.205(c). Employer has responded to both appeals, urging affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has submitted a letter in which he indicates that he will not file response briefs unless requested to do so.[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 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).

To establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).[5] Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(a)(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the direct cause of death or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (c)(2). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R.

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[4] We affirm the administrative law judge's findings that the existence of pneumoconiosis arising out of coal mine employment was established under 20 C.F.R.. §§718.202(a)(2), (a)(4), 718.203(b), a change in condition was proven at 20 C.F.R. §725.310 (2000), and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] As claimant's last coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§718.205(c)(5); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis hastens death only "if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655.

We will first address the allegations of error claimant has raised in her appeal of the denial of benefits in the miner's claim. Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Myers, Wicker, Rosenberg, Vuskovich, Tomashefski, Hussain, Joyce, and Koura. The administrative law judge found that the opinions of Drs. Joyce and Koura could not support a finding of total disability, as neither physician made a determination as to whether the miner was suffering from a totally disabling respiratory or pulmonary impairment. Decision and Order Denying Request for Modification at 17; Director's Exhibits 66, 70, 72.

The administrative law judge found that the remaining physicians, with the exception of Dr. Baker, indicated that the miner was not disabled by a respiratory or pulmonary impairment. Decision and Order at 17. In a report prepared for submission to the Kentucky Department of Workers Claims, Dr. Baker diagnosed a mild obstructive ventilatory defect and stated that the miner had a Class II impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, based upon the miner's FEV1 value being between sixty and eighty percent of the predicted value.[6] Director's Exhibit 62. Dr. Baker diagnosed a second impairment based upon the fact that "persons who develop pneumoconiosis should limit further exposure to the offending agent," which "would imply the [miner] is 100% occupationally disabled for work in the coal mining industry . . . ." *Id.* The administrative law judge determined that Dr. Baker's opinion did not constitute a diagnosis of total disability, because Dr. Baker merely advised against a return to a dusty environment. Decision and Order Denying Request for Modification at 17; Director's Exhibits 62, 69, 107; Claimant's Exhibit 2. The administrative law judge concluded, therefore, that total disability was not established pursuant to Section 718.204(b)(2)(iv).

[6] According to Table 5-12, Page 107, Chapter Five of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed.), a Class II impairment constitutes a ten to twenty-five percent impairment of the whole person.

Claimant states that in light of Dr. Baker's opinion, "it is rational to conclude that the [miner's] condition prevent[ed] him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant's Brief at 4. Claimant also maintains that because pneumoconiosis is a progressive and irreversible disease and because a "considerable amount of time has passed since the initial diagnosis," the administrative law judge should have found that the miner became totally disabled. Claimant further asserts that in addressing the medical opinion evidence regarding total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 3, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In this regard, claimant alleges that the administrative law judge erred in making "no mention of claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability." *Id*. at 4. Claimant's arguments have merit, in part.

Contrary to claimant's assertion, Dr. Baker's statement that the miner must avoid additional exposure to coal mine dust does not constitute a diagnosis of total disability. The United States Court of Appeals for the Sixth Circuit has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *accord Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). We also reject claimant's argument that, because pneumoconiosis is a progressive disease, it must have worsened to the point of total disability since it was first diagnosed. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based on the medical evidence of record. *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-7 n.8 (2003).

As indicated above, however, in weighing the relevant medical opinions at Section 718.204(b)(2)(iv), the administrative law judge did not discuss all of Dr. Baker's report, including his assessment that the miner had a mild obstructive ventilatory defect and a Class II impairment. Because the administrative law judge did not address all relevant evidence, as is required under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), and did not determine whether it was sufficient to establish total disability, we must vacate her finding under Section 718.204(b)(2)(iv). *Cornett*, 227 F.3d at 576, 22 BLR at 2-123; *see also Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). We also vacate, therefore, the denial of benefits in the miner's claim, and remand the case to the

administrative law judge for reconsideration of Dr. Baker's opinion pursuant to Section 718.204(b)(iv).[7] *Id*.

If the administrative law judge determines that total disability has been established at Section 718.204(b)(2)(iv) on remand, she must then consider all of the relevant evidence and determine whether the evidence supportive of a finding of total disability outweighs the contrary probative evidence of record. 20 C.F.R. §718.204(b)(2); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). If the administrative law judge finds that claimant has established total disability on remand, she must then determine whether claimant has proven that pneumoconiosis was a substantially contributing cause of the miner's total disability under 20 C.F.R. §718.204(c).

We will now address claimant's appeal of the administrative law judge's denial of benefits in the survivor's claim. Pursuant to Section 718.205(c), the administrative law judge considered the death certificate and the medical opinions of Drs. Koura, Tomashefski, Oesterling, Rosenberg, and Vuskovich. The administrative law judge accorded little weight to the death certificate, which identified pneumoconiosis as a contributing cause of death, because the deputy coroner, who completed the certificate, failed to identify the evidence that supported his conclusion or indicate that he had any knowledge of the miner's medical history. Decision and Order Denying Benefits at 12; Director's Exhibit 58. The administrative law judge noted that of the remaining physicians of record, only Dr. Koura identified pneumoconiosis as a contributing cause of the miner's death.[8] Decision and Order Denying Benefits at 12; Claimant's Exhibit 1. The administrative law judge determined that Dr. Koura's opinion was entitled to

[7] The administrative law judge indicated that Dr. Baker was one of the miner's treating physicians. Decision and Order Denying Request for Modification at 11; Director's Exhibits 69, 107. Pursuant to 20 C.F.R. §718.104(d), the administrative law judge "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record" based upon the factors set forth in Section 718.104(d)(1)-(4). 20 C.F.R. §718.104(d).

[8] Drs. Tomashefski, Oesterling, Rosenberg and Vuskovich opined that the miner suffered from mild pneumoconiosis, which neither contributed to, caused, or hastened the miner's death. Director's Exhibit 110; Employer's Exhibits 1-6. The administrative law judge noted that these doctors were all Board-certified, and he determined that their opinions were reasoned and documented, and deserving of great weight. Decision and Order Denying Benefits at 12. Claimant does not assign specific error to the weight accorded the opinions of Drs. Tomashefski, Oesterling, Rosenberg or Vuskovich in this appeal.

diminished weight, as Dr. Koura did not adequately explain his opinion or identify the objective evidence upon which he based his conclusion. Decision and Order Denying Benefits at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge also found that Dr. Koura's statement, that pneumoconiosis hastened the miner's death from heart disease, "falls short of meeting the standard of providing 'a specifically defined process that reduces the miner's life by an estimable time'." *Id*., citing *Williams*, 338 F.3d at 518, 22 BLR at 2-655. The administrative law judge concluded, therefore, that claimant did not establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c).

Claimant asserts on appeal that because Dr. Koura, one of the miner's treating physicians, provided a well-reasoned and well-documented opinion in which he opined that pneumoconiosis hastened the miner's death:

> [I]t can reasonably be concluded that coal workers' pneumoconiosis [did] contribute, at least in part, to the miner's death. As such, it appears that Judge Craft may have "selectively analyzed" the evidence.

Claimant's Brief at 5. This statement, however, does not identify any error in the administrative law judge's decision to accord less weight to Dr. Koura's opinion in comparison to the better reasoned opinions of Drs. Tomashefski, Oesterling, Rosenberg, and Vuskovich, that the miner's death was not hastened by pneumoconiosis. Thus, we consider claimant's argument on appeal to be tantamount to a request that the Board reweigh the evidence, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Moreover, we conclude that the administrative law judge acted within her discretion as fact-finder in determining that, regardless of his status as a treating physician, Dr. Koura's opinion did not satisfy the standard set forth in *Williams*, because he did not explain the mechanism by which pneumoconiosis hastened the miner's death. We affirm, therefore, the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis under any of the methods available at Section 718.205(c). *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Consequently, because claimant did not establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement, we affirm the administrative law judge's denial of benefits in the survivor's claim. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in the survivor's claim is affirmed, but the Decision and Order Denying Request for Modification in the miner's claim is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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