

BRB No. 05-0128 BLA

BONNIE J. AKERS	)	
(Widow of ROBERT M. AKERS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 06/29/2005
OMAR MINING 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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Bonnie J. Akers, Lake, West Virginia, *pro se*.

Ashley M. Harman (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order (2003-BLA-5472) of Administrative Law Judge Michael P. Lesniak denying benefits on claims filed by the miner and the survivor 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

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<sup>1</sup> Claimant, Bonnie J. Akers, is the widow of the miner, Robert M. Akers, who died on August 13, 2000. Director's Exhibits 1, 13.

administrative law judge found eighteen years of qualifying coal mine employment, and the parties stipulated to, employer being the proper responsible operator. Decision and Order at 17; Hearing Transcript at 10. Based on the date of filing, the administrative law judge considered entitlement in both the miner's and survivor's claims pursuant to 20 C.F.R. Part 718.<sup>2</sup> After noting that the miner's claim was a subsequent claim, the administrative law judge noted the proper standard and found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was therefore sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Decision and Order at 5. Considering the miner's claim *de novo*, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, but insufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 19-21. The administrative law judge further found, with respect to the survivor's claim, that although the existence of pneumoconiosis arising out of coal mine employment was established, entitlement was precluded as the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 22-24. Accordingly, benefits were denied in both the miner's and survivor's claims.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of

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<sup>2</sup> The miner, Robert M. Akers, filed his initial claim for benefits on June 27, 1973, which was denied on February 15, 1980 as the miner failed to prove any element of entitlement. Director's Exhibit 1. The miner took no further action until he filed a second claim on December 3, 1984, in which benefits were denied by the district director on April 22, 1985. *Id.* The miner filed his third claim for benefits on June 11, 1987, which was finally denied after a modification request on June 13, 1995 by Administrative Law Judge Edith Barnett. *Id.* Director's Exhibit 1. The Benefits Review Board affirmed this denial on August 12, 1996. *Akers v. Omar Mining Co.*, BRB No. 95-1866 BLA (Aug. 12, 1996)(unpub.). The miner filed his fourth claim, the subject of the instant appeal, on March 13, 1998, in which the district director finally denied benefits on November 1, 1999. Director's Exhibit 1. The miner subsequently requested a hearing before the Office of Administrative Law Judges. *Id.* The miner died on August 13, 2000. Director's Exhibit 13. Claimant filed a survivor's claim on April 3, 2001. Director's Exhibit 3. On April 16, 2001, Administrative Law Judge Daniel L. Leland remanded the case to the district director to allow the survivor's claim to be consolidated with the miner's claim. Director's Exhibit 1. The district director denied benefits on November 5, 2002. Director's Exhibit 24. Claimant subsequently requested a hearing on both claims. Director's Exhibit 25.

Workers' Compensation Programs, has filed a letter in which he notes that the administrative law judge failed to address the admissibility of the evidence in the survivor's claim pursuant to 20 C.F.R. §725.414 but maintains that any error is harmless in light of the administrative law judge's credibility determinations with respect to the medical opinion evidence.<sup>3</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).<sup>4</sup>

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<sup>3</sup> As the administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§725.309, 718.202, and 718.203 are favorable to claimant and unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See* Director's Exhibits 1, 2, 5, 42, 43; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. In considering the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) in the miner's claim, the administrative law judge properly determined that all of the pulmonary function and blood gas studies of record were non-qualifying.<sup>5</sup> See 20 C.F.R. §718.204(b)(2)(i), (ii); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Director's Exhibit 1; Decision and Order at 5-6, 20. Furthermore, the administrative law judge correctly concluded that total disability can not be established pursuant to Section 718.204(b)(2)(iii) as the record is devoid of any evidence of cor pulmonale with right sided congestive heart failure. See 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); Decision and Order at 20.

In determining if the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof because no physician opined that claimant was totally disabled.<sup>6</sup> Decision and Order at 20-21; Director's Exhibits 1, 22, 23; Employer's Exhibits 1, 7, 10-12, 14, 16; Claimant's Exhibits 1, 3; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg*

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<sup>5</sup> A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2) (i), (ii).

<sup>6</sup> Drs. Velasco, Acosta, Pfister, Leef, and Green offered no opinion regarding the presence of any pulmonary impairment. Director's Exhibit 1; Employer's Exhibit 16; Claimant's Exhibits 1, 3. Dr. Thavaradhara opined that the miner's cardiopulmonary system was normal. Director's Exhibit 1. Drs. Rectenwald and Leef opined that the miner had a mild pulmonary impairment. Director's Exhibit 1. Drs. Zaldivar, Fino, Repsher, and Caffrey opined that the miner had no pulmonary impairment. Director's Exhibits 1, 23; Employer's Exhibits 1, 2, 9, 12, 13. Dr. Ranavaya opined that the miner suffered from a mild impairment which would not prevent him from performing his usual coal mine work. Director's Exhibit 1. Dr. Castle concluded that from a pulmonary point of view the miner retained the respiratory capacity to perform his usual coal mine employment. Employer's Exhibits 3, 10. Dr. Naeye found that the miner did not have any measurable impairment or disability. Employer's Exhibits 1, 14. Dr. Crouch opined that coal dust exposure could not have caused any degree of functional impairment and could not have contributed to any known disability. Director's Exhibit 22; Employer's Exhibit 7.

*v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

The administrative law judge permissibly accorded “great weight” to the opinions of Drs. Zaldivar, Fino, Ranavaya, Castle and Repsher in light of their qualifications and as their opinions are consistent with the objective evidence of record and supported by the conclusions of Drs. Naeye, Caffrey and Crouch.<sup>7</sup> Decision and Order at 20; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg*, 12 BLR 1-77; *Wetzel v. Director*, OWCP, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; Decision and Order at 20-21; Director’s Exhibits 1, 22, 23; Employer’s Exhibits 1-3, 9, 10, 12, 13. Consequently, we affirm the administrative law judge’s finding that the medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as it is supported by substantial evidence and is in accordance with law. *See Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16.

With respect to the survivor’s claim, the administrative law judge adequately examined and discussed all of the relevant evidence as it relates to the cause of the miner’s death and rationally determined that the evidence of record was insufficient to carry claimant’s burden of proof pursuant to Section 718.205.<sup>8</sup> *Shuff*, 967 F.2d 977, 16 BLR 2-90;

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<sup>7</sup> The record indicates that Drs. Fino, Ranavaya, and Castle are Board-certified in internal and pulmonary disease. Employer’s Exhibits 4, 7, 13, 15. Dr. Repsher is Board-certified in internal medicine, pulmonary disease and critical care medicine. Employer’s Exhibit 11. Dr. Zaldivar is Board-certified in internal medicine, pulmonary disease, and sleep disorders. Director’s Exhibit 1; Employer’s Exhibits 12, 13. The credentials of Drs. Velasco, Rectenwald, Leef, Thavaradhara, Acosta, Pfister, and Leef are not in the record. Director’s Exhibit 1. Drs. Naeye and Caffrey are Board-certified in anatomical and clinical pathology. Director’s Exhibit 23; Employer’s Exhibit 6. Drs. Crouch and Green are Board-certified in anatomic pathology. Director’s Exhibit 22; Employer’s Exhibit 16; Claimant’s Exhibit 1.

<sup>8</sup> The administrative law judge properly determined that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.205(c)(3); Decision and Order at 22.

*Lafferty*, 12 BLR 1-190; *Fagg*, 12 BLR 1-77; *Mazgaj*, 9 BLR 1-201; *Kuchwara*, 7 BLR 1-167; Decision and Order at 22-24; Director's Exhibits 13, 14, 22, 23; Employer's Exhibits 1-4, 7, 9, 13-16; Claimant's Exhibits 1, 3.

The relevant evidence of record concerning the cause of death consists of seven medical opinions, the autopsy report and the death certificate. Dr. Naeye opined that the miner had simple coal workers' pneumoconiosis which did not cause any measurable impairment in lung function, any disability or contribute in any way to the miner's death. Employer's Exhibits 1, 14. Dr. Delara, who performed the autopsy, stated that pneumoconiosis was a contributing factor to the immediate cause of death. Director's Exhibit 14. Dr. Caffrey opined that the miner had simple coal workers' pneumoconiosis which did not contribute to his death which was due to atherosclerosis that affected the miner's coronary arteries, heart and brain which resulted in acute congestive heart failure, severe hypertension and a large ischemic infarct within the brain. Director's Exhibit 23. Dr. Crouch opined that occupational coal mine dust exposure could not have caused or hastened the miner's death. Director's Exhibit 22; Employer's Exhibit 7. Dr. Green opined that the miner had moderately severe coal workers' pneumoconiosis which would have made the heart more susceptible to the effects of hypoxemia which would contribute to the onset of a fatal arrhythmia or acute myocardial infarction. Claimant's Exhibits 1, 3; Employer's Exhibit 16. Dr. Zaldivar opined that coal workers' pneumoconiosis did not cause or contribute to the miner's death in any way and that the miner would have died when and as he did even if he had never worked in the mines because his death was due to cardiovascular disease unrelated to his occupation. Employer's Exhibits 2, 13. Dr. Castle opined that the miner's death was not caused by, contributed to or hastened by the underlying coal workers' pneumoconiosis and the miner's death was a result of acute myocardial infarction in the setting of severe ischemic cardiomyopathy and severe cerebrovascular disease. Employer's Exhibits 3, 15. Dr. Fino opined that the simple coal workers' pneumoconiosis did not cause, contribute to or hasten the miner's death and that the miner would have died as and when he did had he never set foot in the mines or had he never contracted coal workers' pneumoconiosis. Employer's Exhibits 4, 9. The death certificate, signed by Dr. Fernandez, listed the cause of death as acute cardiopulmonary arrest and massive acute myocardial infarction. Director's Exhibit 13.

The administrative law judge acted within his discretion, as fact-finder, in determining that the relevant affirmative evidence, the opinions of Drs. Delara and Green, was not well reasoned or well documented as the physicians did not articulate the basis for their conclusions. *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; Decision and Order at 22-23. Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Naeye, Caffrey and Crouch, because he found their opinions are well reasoned and documented and the physicians were found to be highly qualified board-certified pathologists. *See Sparks*, 213

F.3d 186, 22 BLR 2-251; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; Decision and Order at 22-23; Director's Exhibits 22, 23; Employer's Exhibits 1, 14. The administrative law judge also was more persuaded by the opinions of Drs. Zaldivar, Castle and Fino in light of their qualifications as pulmonary experts and the fact that their reports are well reasoned and documented because they are supported by the objective diagnostic evidence of record, the results of the majority of the reviewing pathologists, the miner's medical history of severe cardiac disease and stroke and the miner's subjective complaints. *See Sparks*, 213 F.3d 186, 22 BLR 2-251; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Tedesco*, 18 BLR 1-103; *Clark*, 12 BLR 1-149; *Fagg*, 12 BLR 1-77; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; Decision and Order at 22-24; Director's Exhibits 14, 22, 23; Employer's Exhibits 1-4, 7, 9, 13-16; Claimant's Exhibits 1, 3. We therefore affirm the administrative law judge's determination that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis.<sup>9</sup>

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See* 20 C.F.R. §718.205(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge rationally found that the evidence of record in the miner's and survivor's claims was insufficient to establish total disability or death due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's findings that the evidence of record is sufficient to establish entitlement in the miner's and survivor's claims as they are

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<sup>9</sup> Although the administrative law judge failed to enforce the evidentiary limitations imposed by 20 C.F.R. §725.414 in deciding the survivor's claim, a remand is not required based upon the circumstances of the instant case, however, as any error is harmless since the administrative law judge properly found the evidence supportive of entitlement lacking credibility and therefore insufficient to meet claimant's burden of proof. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47(en banc); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 22-24.

supported by substantial evidence and are in accordance with law. *See Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26.

Accordingly, the administrative law judge's Decision and Order denying benefits in the miner's and survivor's claims 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