

BRB No. 97-1698 BLA

PAULINE SIZEMORE	)	
(Widow of WILLIAM SIZEMORE)	)	
	)	
Claimant-Petitioner	)	)
	)	
v.	)	
	)	
KENTUCKY PRINCE COAL	)	DATE ISSUED:
CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-	)	
INSURANCE FUND	)	
	)	
Employer/Carrier-	)	
Respondents	)	)
	)	
DIRECTOR, OFFICE OF WORKERS'	)	)
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Pauline Sizemore, Hazard, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, without the assistance of legal counsel, appeals the Decision and Order (96-BLA-677) of Administrative Law Judge Donald W. Mosser denying benefits on claims filed by the miner and 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 miner filed his original claim for black lung benefits on February 18, 1986, which was denied by the district director on August 6, 1986. Decision and Order at 3; Director's Exhibit 81. The miner filed the instant claim on July 2, 1992 and on January 1, 1993, while the claim was pending before the district director, the miner died. Decision and Order at 3; Director's Exhibits 1, 11. On May 10, 1993, the miner's widow, claimant herein, filed a survivor's claim. Decision and Order at 3; Director's Exhibit 2. The district director denied both claims and the case was referred to the Office of Administrative Law Judges on November 28, 1995. Decision and Order at 3; Director's Exhibit 52. The administrative law judge decided this case on the record as the parties waived a formal hearing, credited the miner with seventeen and three-quarter years of coal mine employment and adjudicated the miner's duplicate claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the evidence of record insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). With regard to the survivor's claim, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge denied benefits in both claims. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.<sup>1</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. See *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the

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<sup>1</sup> Inasmuch as the administrative law judge's length of coal mine employment finding as well as his findings that claimant suffers from pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(c), are not adverse to claimant and are not challenged on appeal, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

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 that there is no reversible error contained therein. Initially we address the administrative law judge's consideration of the miner's duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge, in the instant case, considered the entirety of the medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge properly reviewed the evidence of record pursuant to the applicable standard enunciated by the United States Court of Appeals for the Sixth Circuit in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), and concluded that the evidence was insufficient to establish that pneumoconiosis contributed to the miner's total disability. See 20 C.F.R. §718.204(b); Decision and Order at 12-13. The administrative law judge permissibly gave greatest weight to the opinions of Drs. Naeye, Kleinerman and Fino who, although they diagnosed pneumoconiosis, found that the miner's pneumoconiosis did not contribute to his respiratory impairment. Decision and Order at 13; Director's Exhibits 15, 76-77. In addition, the administrative law judge permissibly found that the opinion of Dr. Chaney, that claimant's respiratory impairment could be related to coal mine employment, was outweighed by the contrary physicians' opinions. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Piccin, supra*; Decision and Order at 18-19; Director's Exhibit 74. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *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 finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), an essential element of entitlement under Part 718, entitlement thereunder is precluded in the miner's claim.<sup>2</sup> *Anderson, supra*; *Trent, supra*.

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<sup>2</sup> As we affirm the denial of benefits in the miner's claim on the merits, we need not address the administrative law judge's failure to render specific findings with respect to a material change in conditions. See *Sharondale Corp. v. Ross*, 42 F.3d

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993, 19 BLR 2-10 (6th Cir. 1994).

Next, inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>3</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit, in whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). In finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge permissibly found that the conclusions stated in the deposition of Dr. Chaney, who treated the miner during his last hospitalization, stating that the miner's coal workers' pneumoconiosis probably hastened his death, were outweighed by the contrary, well-reasoned and more persuasive opinions of Drs. Naeye, Caffrey, Kleinerman, and Fino, that

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<sup>3</sup> Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

pneumoconiosis did not contribute to or hasten the miner's death, in light of the physicians' superior qualifications. *Clark, supra; Perry, supra; Piccin, supra;* Decision and Order at 13-14. The administrative law judge has broad discretion in weighing and assessing the evidence of record in determining whether a party has met its burden of proof and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Anderson, supra; Worley, supra.* Thus, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) as supported by substantial evidence.<sup>4</sup> *See Brown, supra.* Claimant's failure to establish death due to pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718 in the survivor's claim, precludes entitlement thereunder. *Anderson, supra; Trent, supra.*

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<sup>4</sup> The administrative law judge properly concluded that the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.205(c)(3), 718.304.

Accordingly, the Decision and Order of the administrative law judge denying benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge