

BRB No. 99-1282 BLA

ALTA VANOVER	)	
(Widow of HERSHEL VANOVER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MULLINS COAL COMPANY,	)	DATE ISSUED:
INCORPORATED OF VIRGINIA	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Alta Vanover, Pound, Virginia, *pro se*.

Melissa Amos Young (Gentry Locke Rakes & Moore), Roanoke, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order (99-BLA-0001) of Administrative Law Judge Linda S. Chapman denying benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

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<sup>1</sup> Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant, but is not representing her on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Initially, Administrative Law Judge Frederick D. Neusner credited the miner with at least thirty-seven and one-half years of coal mine employment and determined that employer was the responsible operator. Judge Neusner found the evidence of record sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), but insufficient to establish that pneumoconiosis caused, contributed to or hastened the miner's death at 20 C.F.R. §718.205. Accordingly, benefits were denied. On appeal, the Board affirmed Judge Neusner's finding that the evidence of record was insufficient to show that pneumoconiosis was a substantial contributing cause of the miner's death and therefore affirmed the denial of benefits. *See Vanover v. Mullins Coal Co.*, BRB No. 96-1386 BLA (May 28, 1997)(unpub.).

Pursuant to a request for modification, Administrative Law Judge Linda S. Chapman (the administrative law judge) determined that claimant's request for modification was timely, credited the miner with thirty-three years of coal mine employment, found employer to be the responsible operator, found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), but found the evidence insufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that the miner's death was caused by complications of pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

In the instant appeal, claimant generally challenges the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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). We must affirm the 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 by 30 U.S.C. §932(a).

In order to establish entitlement to benefits 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,<sup>2</sup> that the miner's death was due to pneumoconiosis, that

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<sup>2</sup> The administrative law judge did not make any findings as to whether the miner's pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. As claimant established that the miner worked in the coal mines for more than 10 years, claimant is

pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis.<sup>3</sup> See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *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). The United States Court of Appeals for the Fourth Circuit has held that any condition that hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c)(2). See *Shuff, supra*.

After consideration of the administrative law judge's Decision and Order 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. Because this case involves a request for modification of a denial of benefits in a previously filed survivor's claim, the administrative law judge properly held that she could only consider this second survivor's claim on the basis of whether a mistake in a determination of fact had been made in the previous Decision and Order. Decision and Order at 3; 20 C.F.R. §725.310; see *Wojtowski v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although new evidence is not necessary for the administrative law judge to decide if a mistake in a determination of fact has occurred, in the instant case, the administrative law judge properly considered the new medical opinion evidence submitted by both parties. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowski, supra*.

At Section 718.205(c), the administrative law judge properly accorded little weight to

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entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). Furthermore, because all the physicians related the miner's pneumoconiosis to his coal mine employment, rebuttal can not be established. See Director's Exhibits 12, 13, 14; Employer's Exhibits 1, 2; Claimant's Exhibit 1.

<sup>3</sup> Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the report of Dr. Tholpady, the miner's treating physician, indicating that the miner's coal workers' pneumoconiosis and chronic obstructive pulmonary disease were contributing factors in the miner's death as it was not supported by any underlying documentation. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In finding the medical opinion evidence insufficient to meet claimant's burden of proof, the administrative law judge properly found Dr. Tholpady's opinion outweighed by the medical opinions of Drs. Naeye, Mullins and Castle, which attributed the miner's death to heart disease and opined that pneumoconiosis did not cause, contribute to or hasten the miner's death. 20 C.F.R. §718.205(c); *see Shuff, supra; Carson, supra; Tedesco, supra; Lucostic, supra*. Thus, we affirm the finding of the administrative law judge that the evidence failed to establish that the miner's pneumoconiosis was a substantially contributing cause or factor leading to his death or that the miner's death was caused by complications of pneumoconiosis and the denial of benefits as it is supported by substantial evidence.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge