

BRB No. 00-1055 BLA

IRENE COLLETT (On behalf of and as)
Widow of EUGENE COLLETT))
)
 Claimant-Petitioner)

v.)
)

SHAMROCK COAL COMPANY,)

DATE ISSUED:

INCORPORATED)
)
 Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant, the widow of the miner, appeals the Decision and Order - Denying Benefits
(99-BLA-1250 and 99-BLA-1251) of Administrative Law Judge Rudolf L. Jansen on both 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 The administrative law judge found, and the parties stipulated to, at least twelve and

¹ The Department of Labor has amended the regulations implementing the Federal

one-half years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 4. Considering the newly submitted evidence, in conjunction with the previously submitted evidence, and the prior Decision and Order denying benefits on the miner's claim, the administrative law judge concluded that the evidence of record was insufficient to establish entitlement to the interim presumption of totally disabling coal worker's pneumoconiosis at 20 C.F.R. §727.203(a) and insufficient to establish entitlement under the regulations found at 20 C.F.R. Part 718. The administrative law judge further found that neither a mistake in a determination of fact nor a change in conditions, sufficient to justify modification of the denial of benefits in the miner's claim, was established. Accordingly, benefits on the miner's claim were denied. Turning to the survivor's claim, the

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 107 (2000) to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, inter alia, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Association v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

² The miner filed his first claim for benefits on May 7, 1979, which was denied on January 21, 1987. Director's Exhibits 1, 43. The denial was affirmed by the Board on September 30, 1988. Director's Exhibit 54. The miner requested modification on September 6, 1989, which was denied on December 11, 1991. Director's Exhibits 55, 85. On June 29, 1993, the Board reversed the denial of modification and remanded for consideration of the claim under Part 727, rather than Part 718. Director's Exhibit 98. On December 16, 1993, benefits were denied again and the Board affirmed the denial. Director's Exhibits 100, 111. The miner requested modification on March 1, 1996, which was denied on March 17, 1997. Director's Exhibits 142, 149. The miner filed a request for modification on August 12, 1998, which was denied on October 9, 1998. Director's Exhibits 150, 155. The miner died on January 7, 1999. Claimant filed a survivor's claim for benefits on February 5, 1999.

administrative law judge found that, in addition to failing to establish the existence of pneumoconiosis, the evidence of record also failed to establish that pneumoconiosis, even if it existed, hastened the miner's death in any way. Accordingly, benefits were denied on the survivor's claim.

On appeal, claimant contends that the administrative law judge properly examined the newly submitted x-ray and medical opinion evidence in regard to the miner's claim, but failed to properly examine all the x-ray and medical opinion evidence in connection with the survivor's claim. Claimant also contends that the administrative law judge erred in failing to find that the miner's death was hastened by pneumoconiosis in connection with the survivor's claim. The employer responds urging affirmance of the denial of benefits on both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act 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 a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); see *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). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *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 the instant case arises, has held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been made. Furthermore, in determining whether modification has been established pursuant to Section 725.310 (2000), the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Turning first to the miner's claim, because claimant contended that the administrative law judge properly examined the newly submitted x-ray and medical opinion evidence on modification, we affirm the administrative law judge's findings thereunder. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984). Likewise, regarding the issue of total disability, we will not address claimant's general contention that the evidence establishes total disability in the miner's claim as it is not sufficiently briefed.³ *Cox, supra*; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Turning to the survivor's claim, claimant contends generally that the x-ray evidence of record is sufficient to establish the existence of pneumoconiosis in the survivor's claim.

³ Claimant appears to argue that the administrative law judge erred in failing to consider that the miner's usual coal mine employment required him to work in a very dusty environment and that his physical condition would have precluded him from working in such an environment. Brief for Claimant at 7. Claimant is mistaken, however, in believing that this evidence bears upon a determination of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Again, however, claimant fails to identify with specificity any error made by the administrative law judge in his consideration of the x-ray evidence. Accordingly, we must affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis. *Cox, supra*.

Claimant next contends that the administrative law judge erred in his weighing of the medical opinion of evidence, specifically contending that the opinions of Drs. Varghese and Bushey are sufficient to establish the existence of pneumoconiosis. We disagree. Contrary to claimant's argument, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Naeye and Hutchins who found that the miner did not have pneumoconiosis, than to the contrary opinions of Drs. Varghese and Bushey, because their opinions were based on an extensive review of the evidence, while Dr. Varghese provided no explanation for his diagnosis of pneumoconiosis and Dr. Bushey relied on an imprecise smoking history which did not reflect the magnitude of the miner's smoking history. Decision and Order at 11. *See Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-130 (6th Cir. 1989); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1988)(unpub.); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, the administrative law judge permissibly found that the existence of pneumoconiosis was not established by medical opinion evidence.⁴

Finally, with respect to the survivor's claim, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish that the miner's death was due to pneumoconiosis. We disagree. The administrative law judge permissibly found Dr. Delara's opinion, finding that pneumoconiosis contributed to death, was outweighed by the contrary, better supported and better reasoned opinions of record. *Clark, supra*; *King, supra*; *Fields, supra*; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish death due to pneumoconiosis as supported by substantial evidence.

The administrative law judge is empowered to weigh the medical evidence and to

⁴ The administrative law judge's finding pursuant to Section 718.202(a)(2) and (3)(2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1- 710 (1983).

draw his own inferences therefrom, *see Maypray, supra*, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis, total disability or death due to pneumoconiosis. *See Griffith, supra; Worrell, supra; Brown, supra; Trent, supra; Perry, supra.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits on both the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge