

BRB Nos. 04-0903 BLA
and 04-0903 BLA-A

FRANCES JONES)	
(Widow of THOMAS A. JONES))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
ELKAY MINING COMPANY)	DATE ISSUED: 08/05/2005
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits in Miner's and Survivor's Claims of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Ashley M. Harman, Douglas A. Smoot, and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals, and employer cross-appeals, the Decision and Order denying benefits (03-BLA-0080, 03-BLA-5299) of Administrative Law Judge Michael P. Lesniak on modification of a miner's duplicate 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).² Initially, the administrative law judge credited the miner with "at least 23 years" of coal mine employment pursuant to the parties' stipulation, 2003 Hearing Transcript at 6. Decision and Order at 19, 29. Regarding the miner's claim, the administrative law judge considered the newly submitted evidence and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but succeeded in establishing total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* at 27. Therefore, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* at 28. The administrative law judge then considered all the evidence in the record and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to

¹ Claimant is Frances Jones, the widow of Thomas A. Jones, the miner. Claimant filed her survivor's claim for benefits on January 29, 2001. Survivor's Claim Director's Exhibit 3.

The miner's first claim for benefits, filed on July 9, 1970, was finally denied on September 5, 1980. Director's Exhibit 28. The miner's second claim, filed on February 6, 1987, was finally denied on May 13, 1987. Director's Exhibit 29-4, 29-40. The miner's third claim, filed on April 9, 1998, was finally denied by the Board on December 7, 2000. Director's Exhibits 1, 32-25. In its Decision and Order, the Board affirmed Administrative Law Judge Daniel L. Leland's decision to deny benefits. Director's Exhibit 32-35. In doing so, the Board affirmed Judge Leland's findings that the miner failed to establish the existence of pneumoconiosis and total respiratory disability and, therefore, that the miner failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The miner died on November 9, 2000. Survivor's Claim Director's Exhibit 13. On December 20, 2000, claimant requested modification of the denial of the miner's third claim. Director's Exhibit 32-28. The district director granted modification and awarded benefits on the miner's third claim. Director's Exhibit 32-47. Thereafter, employer timely requested a hearing before the Office of Administrative Law Judges. Survivor's Claim Director's Exhibit 1.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Regarding the survivor's claim, the administrative law judge incorporated his findings from the miner's claim into the survivor's claim and, therefore, found that claimant failed to establish the existence of pneumoconiosis in her claim. *Id.* at 31-32. Additionally, the administrative law judge found that claimant failed to establish that pneumoconiosis was a cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(1)-(3), (c)(5). *Id.* at 33. Accordingly, the administrative law judge denied benefits on the miner's and survivor's claims.

On appeal, claimant contends that the administrative law judge erred in failing to find that claimant established the existence of pneumoconiosis. Claimant's Brief at 3-4. Claimant further asserts that the administrative law judge's error in failing to find the existence of pneumoconiosis prevented him from properly determining whether the miner's disability was due to pneumoconiosis pursuant to Section 718.204(c) and whether the miner's pneumoconiosis caused his death pursuant to Section 718.205(c). *Id.* On cross-appeal, employer asserts that the administrative law judge erred in according less weight to the opinions of Drs. Naeye and Caffrey at Section 718.202(a)(2), (a)(4). Employer's Brief on Cross-Appeal at 5-9. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in these appeals.³

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director*,

³ We affirm, as unchallenged on appeal, the administrative law judge's finding regarding the miner's length of coal mine employment and his finding that, based on the new evidence submitted since the denial of the miner's third claim, claimant established total respiratory disability pursuant to 20 C.F.R. §718.202(b)(2), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, as unchallenged, the administrative law judge's finding that, based on all the evidence of record, claimant failed to demonstrate the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(3) in the miner's and survivor's claims. *Id.*

OWCP, 9 BLR 1-1 (1986)(*en banc*). To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

Initially, we note that the miner's claim involves a request for modification of a duplicate claim. Because the denial of the miner's third claim was based upon a failure to establish a material change in conditions, the administrative law judge properly considered whether the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Administrative Law Judge Daniel L. Leland's denial of the miner's 1998 duplicate claim) alone was sufficient to support a material change in conditions. See *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). Because the administrative law judge found this new evidence sufficient to establish total respiratory disability, he found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000).⁴ Decision and Order at 28. The administrative law judge was next required to address whether all of the evidence submitted since the denial of the second claim is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000). If the evidence is found sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the miner's duplicate claim. The administrative law judge, in this case, failed to consider whether all of the evidence submitted since the denial of the second claim is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000). However, because we affirm the administrative law judge's denial of benefits in the miner's claim on the merits, *see* discussion, *infra*, we deem any error the administrative law judge may have made in this regard to be harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding the existence of pneumoconiosis, claimant first asserts that the administrative law judge simply accepted the opinions of employer's physicians regarding the cause of the miner's pulmonary condition, without considering the rest of the medical evidence. The administrative law judge, however, did not simply accept employer's physicians' opinions. Rather, the administrative law judge thoroughly considered all of the medical opinion evidence at Section 718.202(a)(2) and (a)(4) and determined that the reports of Drs. Bush, Tomashefski, and Spagnolo, which did not find the existence of pneumoconiosis, are entitled to greater weight because they are the best

⁴ Although the Department of Labor has made substantive revisions to 20 C.F.R. §§725.309 and 725.310, these revisions only apply to claims filed after January 19, 2001.

documented and best reasoned opinions in the record. Decision and Order at 25, 26, 28, 32.

Claimant next contends that, prior to rendering his Section 718.202(a) finding, the administrative law judge failed to consider all of the evidence regarding the existence of pneumoconiosis, in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).⁵ Contrary to claimant's contention, the administrative law judge specifically cited to *Compton* and, consistent with the Fourth Circuit court's holding in that case, considered all the relevant evidence together in determining whether claimant established the existence of pneumoconiosis in the miner's and survivor's claims. Decision and Order at 27, 32; *Compton*, 211 F.3d at 211, 22 BLR at 2-174; see *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Claimant has not set forth with specificity any other alleged error made by the administrative law judge in his consideration of the evidence regarding the existence of pneumoconiosis at Section 718.202(a)(2) and (a)(4). Since claimant has failed to provide a basis upon which the Board may further review the administrative law judge's weighing of the medical evidence on the issue of pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(4) in the miner's and survivor's claims. 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, we further affirm the administrative law judge's denial of benefits in the miner's and survivor's claims. See *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of the foregoing, it is unnecessary for us to address employer's challenge, on cross-appeal, to the administrative law judge's decision to accord less weight to the opinions of Drs. Naeye and Caffrey.⁶ See *Larioni*, 6 BLR at 1-1278.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁶ In light of the foregoing, it is also unnecessary for us to address claimant's assertions of error regarding 20 C.F.R. §§718.204(c) and 718.205(c), as a finding of entitlement is precluded in the miner's and survivor's claims. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge