

BRB No. 00-0331 BLA

GEORGIA K. BIAS)
(Widow of GEORGE R. BIAS))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED:
)
 ISLAND CREEK KENTUCKY)
 MINING COMPANY)
)
 Employer-)
 Respondent)
)
 DIRECTOR, OFFICE OF)
 WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR) DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denying Benefits on Both Claims of
Gerald M. Tierney, Administrative Law Judge, United States
Department of Labor.

Jason E. Huber (Forman & Crane, L.C.), Charleston, West Virginia, for
claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West
Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits on Both Claims (99-BLA-0090) of Administrative Law Judge Gerald M. Tierney on 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). Initially, the administrative law judge determined that this case involves the consolidation of a duplicate miner's claim filed on November 5, 1997 and a survivor's claim filed on February 24, 1998. The administrative law judge credited the miner with thirty-six and three-quarters years of coal mine employment and adjudicated both the miner's and the survivor's claims pursuant to 20 C.F.R. Part 718. Addressing the miner's claim, the administrative law judge determined that the miner's previous claim was denied because the miner failed to establish a total respiratory or pulmonary disability due to pneumoconiosis and, therefore, the new evidence must establish this element to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Weighing the newly submitted evidence, the administrative law judge found that the preponderance of the newly submitted evidence was insufficient to establish that the miner was suffering from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. In addition, the administrative law judge found that the new evidence was insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Therefore, the administrative law judge found the newly submitted evidence insufficient to establish a material change in conditions under Section 725.309. Addressing the merits of the survivor's claim, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R.

¹ Claimant is the widow of the miner, George R. Bias, who died on February 6, 1998. Director's Exhibit 9. The miner filed his most recent application for benefits on November 5, 1997. Director's Exhibit 2. Claimant filed her application for survivor's benefits on February 24, 1998. Director's Exhibit 1. Both claims are presently pending.

² The miner filed his original application for benefits on April 16, 1985. Director's Exhibit 37. This claim was denied by the district director on September 27, 1985, based on his finding that the miner failed to establish the existence of total disability due to pneumoconiosis. *Id.* No further action was taken on this claim.

§718.205(c). The administrative law judge, therefore, found that claimant failed to establish entitlement in her survivor's claim. Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in denying benefits in the miner's and the survivor's claims, arguing that the administrative law judge's Decision and Order was arbitrary, unreasonable and constituted an abuse of discretion. Claimant further contends that the administrative law judge erred in relying on the opinions of employer's physicians which were patently hostile to the Act. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

In challenging the administrative law judge's denial of the miner's duplicate claim, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish a material change in conditions inasmuch as the medical evidence of record establishes a worsening of the miner's general physical condition. In addition, claimant generally contends that the administrative law judge erred in finding the medical evidence insufficient to establish total disability due to pneumoconiosis. In challenging this finding, claimant sets forth the medical reports she contends are supportive of a finding of total disability due to pneumoconiosis. Claimant's arguments lack merit.

Contrary to claimant's contentions, in order to establish a material change in conditions pursuant to Section 725.309(d), claimant must establish one of the

³ The parties do not challenge the administrative law judge's decision to credit the miner with thirty-six and three-quarters years of coal mine employment, or his findings that the evidence 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(b), but insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3), or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1). Therefore, these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

elements of entitlement previously adjudicated against the miner and not merely that his condition, in general, has changed. 20 C.F.R. §725.309(d); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); see generally *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In the instant case, the administrative law judge correctly found that the previous denial was based on a finding that the miner failed to establish total disability due to pneumoconiosis, Decision and Order at 3; see Director's Exhibit 37, and, therefore, properly considered whether the newly submitted evidence was sufficient to establish total disability due to pneumoconiosis. Decision and Order at 4-5.

In weighing the newly submitted medical evidence, the administrative law judge rationally found that the only opinion supportive of claimant's burden was the second report of Dr. Ranavaya, in which the physician responded in the affirmative to the question as to whether claimant was totally disabled due to pneumoconiosis at the time of his death. However, the administrative law judge reasonably found that this opinion was entitled no weight because Dr. Ranavaya did not provide an adequate rationale or documentation for his conclusion. Decision and Order at 5; Director's Exhibit 15; see *Lafferty v. Cannelton*

⁴ Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that in considering whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one element of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

⁵ Dr. Ranavaya stated that his conclusion was based on a review of the available medical record including an autopsy review by Dr. Kahn, which indicated Progressive Massive Fibrosis, *i.e.*, complicated pneumoconiosis. Director's Exhibit 15. Dr. Kahn's opinion, however, diagnosed coal workers' pneumoconiosis complicated by severe silicosis, based on his finding of confluent nodules which sometimes approach one centimeter, a standard used to define Progressive Massive Fibrosis. *Id.* The administrative law judge found that this was not a diagnosis of complicated pneumoconiosis, Decision and Order at 4, a finding not challenged by claimant on appeal.

Industries, Inc., 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); see also *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Inasmuch as we affirm the administrative law judge's finding that the opinion of Dr. Ranavaya, the only opinion supportive of a finding of total disability due to pneumoconiosis, was insufficient to establish total respiratory disability due to pneumoconiosis, we affirm his finding that claimant has not established a material change in conditions pursuant to Section 725.309(d), and we affirm his denial of benefits in the miner's claim. 20 C.F.R. §725.309(d); see *Rutter, supra*; see generally *Lafferty, supra*.

With respect to the survivor's claim, we affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death. Within a reasonable exercise of his discretion as trier-of-fact, the administrative law judge found that the death certificate, as certified by Dr. Thavaradhara, was insufficient to establish that pneumoconiosis was a contributing cause of the miner's death. The administrative law judge reasonably found that, while Dr. Thavaradhara was one of the miner's treating physicians and that the record contains treatment and hospital summaries documenting the prior diagnoses of coal workers' pneumoconiosis by Dr. Thavaradhara, the physician failed to provide a rationale to support his conclusions or explain by what mechanism the

⁶ Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was a substantially contributing cause of the miner's death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); see generally *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

⁷ The death certificate lists the cause of the miner's death as cardiopulmonary arrest which was due to COPD [chronic obstructive pulmonary disease], CWP [coal workers' pneumoconiosis] and SLE [systemic lupus erythematosus]. Director's Exhibit 9.

miner's pneumoconiosis acted to contribute to his death. Decision and Order at 6; Director's Exhibit 9; see *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); see generally *Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). We, therefore, affirm the administrative law judge's determination that Dr. Thavaradhara's conclusions on the death certificate were not well-reasoned or documented. *Id.*

Moreover, contrary to claimant's contention, the administrative law judge reasonably found that the opinion of Dr. Racadag, the autopsy prosector, that "the pathological changes seen probably contributed to the miner's morbidity," was insufficient to establish entitlement inasmuch as Dr. Racadag provided no rationale for his conclusion. Decision and Order at 6; Director's Exhibit 10; see *Lafferty, supra*; *Clark, supra*; see also *Hicks, supra*. In addition, the administrative law judge found that Dr. Racadag's conclusion was equivocal. Decision and Order at 6; see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Similarly, the administrative law judge reasonably found that Dr. Ranavaya's April 1998 report was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death inasmuch as Dr. Ranavaya did not provide an adequate rationale for his finding, but merely stated that his opinion was based on a review of the available medical record, without explaining how this evidence supported his conclusion. Decision and Order at 6; Director's Exhibit 15; see *Clark, supra*; *Tackett, supra*. Inasmuch as we affirm the administrative law judge's finding that the opinions of Drs. Thavaradhara, Racadag and Ranavaya, the only evidence supportive of claimant's burden, are insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, we affirm his finding that claimant failed to establish entitlement to survivor's benefits under Section 718.205(c). See *Shuff, supra*; see also *Mays, supra*; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits on Both Claims is affirmed.

⁸ In light of our affirmance of the administrative law judge's finding that the opinions of Drs. Thavaradhara, Racadag and Ranavaya, the only evidence supportive of claimant's burden, are insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, we need not address claimant's further contentions regarding the contrary evidence of record inasmuch as error, if any, in the administrative law judge's consideration of those opinions is harmless. See generally *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge