

BRB No. 00-0342 BLA

LILLIAN M. MATHENY)	
(Widow of WILLIAM MATHENY))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

Lillian M. Matheny, Dixie, West Virginia, *pro se*.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits on Both Claims (96-BLA-1004) of Administrative Law Judge Gerald M. Tierney on a duplicate miner's claim and on a survivor's claim both 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.* With respect to the miner's claim, the administrative law judge found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(c) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge also found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) with respect to the survivor's claim. Accordingly, the administrative law judge denied both claims.

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. *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director, Office of Workers' Compensation Programs (the Director), in response to claimant's appeal, asserts that the administrative law judge's finding that the

¹Claimant is Lillian Matheny, surviving spouse of the miner, William Matheny. The relevant procedural history of these claims is as follows: the miner filed a claim with the Social Security Administration (SSA) on June 29, 1973, which was finally denied by Department of Labor (DOL) on October 31, 1984, on the basis that the evidence failed to establish a totally disabling respiratory impairment. Director's Exhibit 20. The miner took no further action on the claim. Thus, it became finally denied. The miner filed a duplicate claim on January 19, 1989. Director's Exhibit 21. This claim was informally denied on July 7, 1989, and no further action was taken on this claim. *Id.* The miner filed a second duplicate claim on October 29, 1991. This claim was informally denied on May 13, 1992, on the ground that the evidence failed to establish a totally disabling respiratory impairment. Director's Exhibit 22. The miner again took no further action on the claim. The miner then filed a third duplicate claim, the instant miner's claim, on January 3, 1994. Director's Exhibit 1. The miner died on May 20, 1995. Director's Exhibit 42. Claimant then filed the instant survivor's claim on July 19, 1995. Director's Exhibit 34. Administrative Law Judge Gerald M. Tierney again denied benefits on both claims in a Decision and Order dated November 16, 1999. It is from this decision that claimant files the instant appeal on both claims.

evidence fails to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c), and thereby, a material change in conditions in the miner's claim pursuant to Section 725.309(c), is supported by substantial evidence. Accordingly, the Director urges affirmance of the administrative law judge's denial of benefits on the miner's claim. The Director also asserts that the administrative law judge's finding that the evidence fails to establish death due to pneumoconiosis at Section 718.205 is supported by substantial evidence, and thus, urges affirmance of the denial of benefits on the survivor's claim.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 763 (1997). The miner's last claim, filed in 1991, was denied because he failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 22. Consequently, in order to establish a material change in conditions pursuant to Section 725.309, the newly submitted evidence in the miner's claim must support a finding of total respiratory disability pursuant to Section 718.204(c).

With respect to the administrative law judge's finding at Section 718.204(c)(1), the administrative law judge correctly found that the one newly submitted pulmonary function study of record produced non-qualifying values. Director's Exhibit 11. Thus, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also correctly found that the two newly submitted blood gas studies of record produced non-qualifying values. Director's Exhibits 13, 46. As the evidence is, thus, insufficient to establish total disability pursuant to Section 718.204(c)(2), we affirm the administrative law judge's finding thereunder. *See Clark, supra; Fields, supra; Tucker v Director, OWCP*, 10 BLR 1-35 (1987).

With respect to Section 718.204(c)(3), the administrative law judge correctly found that the record does not contain any evidence of cor pulmonale with right sided congestive heart disease. Thus, claimant cannot establish total disability under this subsection.

With respect to the administrative law judge's finding at Section 718.204(c)(4), he found that the record contains four relevant medical opinions by Drs. Walker, Spagnolo, Caldwell, and Cohen. Director's Exhibits 12, 13, 24, 43; Claimant's Exhibit 3. The

administrative law judge correctly determined that Dr. Walker concluded that the miner was able to perform his last job in coal mine employment and that Dr. Spagnolo concluded that the miner was not totally disabled. Decision and Order at 4; Director's Exhibits 12, 13, 24. He also correctly noted that Dr. Caldwell stated that the miner's pulmonary changes were not such that would lead him to believe that there was any major disability brought on by his lung disease. Director's Exhibit 43. Finally, the administrative law judge correctly found that Dr. Cohen opined that the miner had normal spirometry during his lifetime. Claimant's Exhibit 3. As the administrative law judge's finding that these opinions are legally insufficient to sustain claimant's burden of establishing total respiratory disability at Section 718.204(c)(4) is supported by substantial evidence, we affirm it. See *Beatty v. Danri Corp.*, 49 F. 3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986). Based upon the foregoing, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at Section 718.204(c), as it is supported by substantial evidence and is in accordance with applicable law. We also affirm the administrative law judge's findings that the evidence is, thus, insufficient to establish a material change in conditions at Section 725.309(c). *Rutter, supra*. Consequently, and we affirm the administrative law judge's denial of benefits with respect to the miner's claim.

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). See 20 C.F.R. §§ 718.1, 718.2, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

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 establishes 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).

The administrative law judge considered the opinions of Drs. Caldwell, Cohen, Stanton and Kelly. Director's Exhibits 42, 43, 44; Claimant's Exhibits 1, 2, 3. The administrative law judge correctly determined that Dr. Ranavaya concluded that pneumoconiosis was not a substantially contributing cause or factor of the miner's death, and as such was insufficient to establish claimant's burden of proof at Section 718.205 pursuant to *Shuff*; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley, supra*. The administrative law judge next considered Dr. Caldwell's report. Dr. Caldwell found on autopsy that the miner's "diffuse simple coal workers' pneumoconiosis could have played a minor part in the terminal episode if indeed the cause of death was cardiac arrhythmia brought on by some degree of hypoxia." Dr. Caldwell further found that the chronic lung disease related mainly to his coal workers' pneumoconiosis could have added to this hypoxia".

Director's Exhibit 43. The administrative law judge, within his discretion, gave less weight to Dr. Caldwell's opinion, as he found it to be equivocal. See *Justice v. Island Creek Coal Co.*, 11 BLR 1- 91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Ziegler Coal Co.*, 9 BLR 1-106 (1986). The administrative law judge, within his discretion, also discounted Dr. Cohen's opinion that "coal workers' pneumoconiosis likely caused an increased work load on the heart leading to a greater incidence of arrhythmias and sudden death" on the basis that it was also equivocal.

Claimant's Exhibit 3. The administrative law judge additionally considered Dr. Stanton's report. Dr. Stanton stated that the miner's death was due to cardiac arrest due to severe arteriosclerotic heart disease on the miner's death certificate. Director's Exhibit 42. The administrative law judge noted that in a supplemental report, Dr. Stanton commented that pneumoconiosis complicated the miner's cardiac disease and significantly worsened the miner's overall condition. Claimant's Exhibit 1. The administrative law judge correctly noted, however, that Dr. Stanton fell short of stating that pneumoconiosis was a substantially contributing cause of the miner's death or of stating that it hastened the miner's death in any way. Decision and Order at 6. Thus, the administrative law judge properly found that Dr. Stanton's opinion was legally insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). *Shuff, supra*; *Trumbo, supra*; *Dillon, supra*; *Neeley, supra*. Finally, while Dr. Kelly stated that pneumoconiosis was a contributing factor to the miner's death and that it was likely that it hastened the miner's death, the administrative law judge permissibly discounted Dr. Kelly's statement because it was unsupported by any medical documentation. Decision and Order at 6; Claimant's Exhibit 2; see *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). Moreover, the administrative law judge permissibly gave less weight to Dr. Kelly's statement that it was likely that pneumoconiosis hastened the miner's death on the basis that it was equivocal. See *Justice, supra*; *Campbell, supra*; *Snorton, supra*. Thus, the administrative law judge properly determined that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) pursuant to *Shuff*. We affirm, therefore, the administrative law judge's findings pursuant to Section

718.205(c), and thereby affirm the administrative law judge's denial of benefits in the instant survivor's claim. *See Trumbo, supra; Neeley, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge