

BRB No. 03-0483 BLA

MATTIE S. TOBIN)	
(Widow of JAMES P. TOBIN))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 12/10/2003
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Mattie S. Tobin, Pine Grove, Pennsylvania, *pro se*.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2002-BLA-00335 and 2002-BLA-05197) of Administrative Law Judge Janice K. Bullard denying benefits on claims filed by the miner and the survivor 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 Based on the date of filing, the administrative law judge considered entitlement in

¹The 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

both the miner's and survivor's claims pursuant to 20 C.F.R. Part 718.² Decision and Order at 3. After determining that the miner's claim was a modification request of a duplicate claim, the administrative law judge found that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000) as the evidence was insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). Decision and Order at 2-9. The administrative law judge further found with respect to the survivor's claim that claimant failed to establish that the miner's death was due to pneumoconiosis. Decision and Order at 10-11. Accordingly, benefits were denied in both the miner's and survivor's claims.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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.

²Claimant is Mattie S. Tobin, the miner's widow. The miner, James P. Tobin, filed his initial claim for benefits on June 27, 1973, which was finally denied on March 26, 1980. Director's Exhibit 24. The miner took no further action until he filed another claim on February 9, 1988, which was finally denied on August 21, 1991. Director's Exhibit 24. The miner filed another claim on September 29, 1991, which was deemed a modification request and denied on May 18, 1992. Director's Exhibit 24. The miner filed his next claim on April 17, 1997 which was finally denied on April 14, 2000. Director's Exhibits 1, 33, 40. The miner requested modification on November 8, 2000, which was denied by the district director on January 31, 2001. Director's Exhibits 41, 44. After the case was transferred to the Office of Administrative Law Judges, Director's Exhibit 45, the miner died on May 25, 2001. Claimant filed a survivor's claim on August 1, 2001, which was denied on March 21, 2002. Director's Exhibits 54, 55, 65. Claimant subsequently requested a hearing on both claims. Director's Exhibit 66.

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 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 and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).³

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The United States Court of Appeals for the Third Circuit held in *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), that in ruling on a petition for modification, the administrative law judge must determine whether the record demonstrates a change in conditions since the prior decision or a mistake of fact in the prior decision, even where no specific allegation of either has been made by claimant. Furthermore, in determining whether claimant has established a basis for modification 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); *O=Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

³This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

In the prior decision, Administrative Law Judge Ainsworth H. Brown found that the miner established the existence of pneumoconiosis arising out of coal mine employment and thus established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). However, benefits were denied because claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). This finding was affirmed by the Board. Director's Exhibits 33, 40; *Tobin v. Director, OWCP*, BRB No. 99-0750 BLA (April 14, 2000)(unpublished).

The administrative law judge, in this case, reviewed the relevant evidence of record in the prior decision to determine if there had been a mistake in a determination of fact, and properly concluded that the denial of entitlement by Administrative Law Judge Ainsworth H. Brown was correct. Decision and Order at 4-9; *Keating*, 71 F.3d 1118, 20 BLR 2-53; *Nataloni*, 17 BLR 1-82; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge also properly found that the newly submitted pulmonary function study and blood gas study evidence was unreliable and thus insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(i)-(ii) and therefore insufficient to establish a change in condition. *Keating*, 71 F.3d 1118; Decision and Order at 6-8; Director's Exhibits 41, 42, 60. The administrative law judge rationally determined that the October 17, 2000 pulmonary function study conducted by Dr. Kraynak was entitled to no probative value as it was invalidated by Dr. Levinson who provided a detailed commentary and possessed superior credentials.⁴ Decision and Order at 6-7; Director's Exhibits 41, 42; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Dillon v. Director, OWCP*, 11 BLR 1-113 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge, within her discretion as fact-finder, permissibly determined that the April 4, 2001 blood gas study does not reliably reflect a finding of total disability as the study does not conform with the requirements set forth in 20 C.F.R. §718.105. See 20 C.F.R. §718.105(c), (d); Decision and Order at 8; Director's Exhibit 60; *Director, OWCP v. Siwec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Trent*, 11 BLR 1-26; *Winchester*, 9 BLR 1-177; *Lucostic*, 8 BLR 1-46; *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted pulmonary function study and blood gas study evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(ii).

⁴The record indicates that Dr. Kraynak is Board-eligible in family medicine. Director's Exhibits 8, 61. Dr. Levinson is Board-certified in internal medicine with a subspecialty in pulmonary disease. Director's Exhibit 62.

With respect to Section 718.204(b)(2)(iv), the administrative law judge considered the entirety of the newly submitted medical opinion evidence of record, *i.e.*, the opinions of Drs. Kraynak and Sherman, and permissibly found that the medical opinions were insufficient to establish total disability. Decision and Order at 8-9; Director's Exhibits 61, 62. Dr. Kraynak stated that the miner had been under his care for numerous years and opined that the miner had coal workers' pneumoconiosis during his lifetime and was markedly short of breath for years prior to his death. Director's Exhibit 61. Dr. Sherman opined that the miner was not disabled by coal workers' pneumoconiosis prior to his death. Director's Exhibit 62. The administrative law judge properly accorded determinative weight to the opinion of Dr. Sherman over the contrary opinion of Dr. Kraynak because he found Dr. Sherman possessed superior credentials and his opinion was detailed, well documented and consistent with the clinical studies of record. *See Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 9.

The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields*, 10 BLR 1-19; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Fuller*, 6 BLR 1-1291; Decision and Order at 9; Director's Exhibits 61, 62. Further, although Dr. Kraynak was the miner's treating physician, the administrative law judge has provided a rational reason for finding his opinion insufficient to meet claimant's burden of proof. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; Decision and Order at 9. Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) and therefore insufficient to establish modification pursuant to Section 725.310 (2000). *Keating*, 71 F.3d 1118, 20 BLR 2-53; *Gee*, 9 BLR 1-4.

With respect to the survivor's claim, the relevant evidence of record concerning the cause of death consists of two medical opinions and the death certificate. Dr. Sherman opined that the miner's death was due to progressive leukemia and stated that there was no data in the record to support any pulmonary contribution to the miner's death. Director's Exhibit 62. The death certificate, signed by Deputy Coroner Dianne Snyder Zimmerman,

listed the cause of death as lymphatic leukemia.⁵ Director's Exhibit 55. Dr. Kraynak, the miner's treating physician, noted that the miner had been under his care for numerous years and opined that the miner's death was definitely due to his black lung. Director's Exhibit 61. Dr. Kraynak further stated that the miner was markedly short of breath for years prior to his demise and that there was no doubt that his death was precipitated by his coal workers' pneumoconiosis. *Id.*

The administrative law judge properly considered this evidence and rationally acted within her discretion, as fact-finder, in according greater weight to the opinion of Dr. Sherman than to the medical opinion of Dr. Kraynak, as the physician possessed superior credentials and offered a detailed, thorough and well-reasoned opinion based upon a review of the miner's medical treatment, diagnoses and the results of objective testing. *See Balsavage*, 295 F.3d 390, 22 BLR 2-386; *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; Decision and Order at 11; Director's Exhibits 61, 62. Moreover, the administrative law judge permissibly accorded less weight to the opinion of Dr. Kraynak, the only affirmative evidence that the miner's death was due to pneumoconiosis, as the opinion is conclusory and lacks a specific objective foundation for his determination about the miner's cause of death since the physician failed to set forth any evidentiary basis for his conclusions. *See Balsavage*, 295 F.3d 390, 22 BLR 2-386; *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Evosevich*, 789 F.2d 1021, 9 BLR 2-10; *Collins*, 21 BLR 1-181; *Tedesco*, 18 BLR 1-103; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; Decision and Order at 11.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See* 20 C.F.R. §718.205(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found that the evidence of record in the miner's claim was insufficient to establish a basis for modification and was insufficient in the survivor's claim to establish that the miner's death was due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Keating*, 71 F.3d 1118, 20

⁵The death certificate does not indicate that pneumoconiosis or any other dust-related disease contributed to the miner's death and therefore this evidence is insufficient to meet claimant's burden of proof. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

BLR 2-53; *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26. The administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish a basis for modification in the miner's claim or that the miner's death was due to pneumoconiosis in the survivor's claim as they are supported by substantial evidence and are in accordance with law.⁶ *See Keating*, 71 F.3d 1118, 20 BLR 2-53; *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26.

Because claimant has failed to establish a basis for modification or that the miner's death was due to pneumoconiosis, entitlement is precluded. *See Keating*, 71 F.3d 1118, 20 BLR 2-53; *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26; *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

⁶The administrative law judge properly found that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. *See* 20 C.F.R. §718.205(c)(3); Decision and Order at 10.

Accordingly, the administrative law judge's Decision and Order denying benefits in the miner's and survivor's claims is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge