

BRB No. 04-0347 BLA

KATHLEEN GLADYS CLONCH	)	
(Widow of ROBERT CLONCH)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED: 12/21/2004
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher C. Russell (Porter, Wright, Morris & Arthur, LLP), Columbus, Ohio, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant<sup>1</sup> appeals the Decision and Order (03-BLA-5432) of Administrative Law Judge Joseph E. Kane denying benefits on claims 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). This case involves both a miner's request for modification of a 1994

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<sup>1</sup> Claimant is the surviving spouse of the deceased miner who died on April 19, 2001. Director's Exhibit 3A.

duplicate claim<sup>2</sup> and a 2001 survivor's claim. By Decision and Order dated October 22, 1999, Administrative Law Judge Donald W. Mosser found that the miner's 1981 and 1989 claims had been abandoned. Director's Exhibit 50. In his consideration of the miner's 1994 duplicate claim, Judge Mosser found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Judge Mosser also found that the newly submitted evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Judge Mosser, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, Judge Mosser denied benefits. *Id.*

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<sup>2</sup> The relevant procedural history of this case is as follows: The miner initially filed a claim for benefits on August 17, 1981. Director's Exhibit 30. On December 3, 1981, the district director denied benefits because he found that the evidence was insufficient to establish that the miner was totally disabled due to pneumoconiosis. *Id.* There is no indication that the miner took any further action in regard to his 1981 claim.

The miner filed a second claim on July 13, 1989. Director's Exhibit 31. In a Proposed Decision and Order dated October 5, 1989, the district director found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The district director also found that the evidence was insufficient to establish that the miner was totally disabled due to pneumoconiosis. *Id.* The district director, therefore, denied benefits. *Id.* By letter dated January 19, 1990, J.B. O'Brien, an attorney, informed the district director that he had been authorized by the miner to pursue his claim for black lung benefits. *Id.* In addition to attaching Form CM-1078, Mr. O'Brien requested a copy of the file so that he could "file notice of appeal, motion for extension of time within which to acquire medical evidence, etc." *Id.* By letter dated January 23, 1990, the district director acknowledged Mr. O'Brien's January 19, 1990 correspondence with Form CM-1078. *Id.* The district director further stated that:

[The miner's] second black lung claim was denied [on] October 5, 1989. To my knowledge, he did not appeal to the Benefits Review Board within the specified thirty (30) day period. However, [the miner's] claim would be subject to modification per 20 C.F.R. §725.310.

Director's Exhibit 31.

There is no indication that the miner took any further action in regard to his 1989 claim. The miner filed a third claim on January 25, 1994. Director's Exhibit 1.

On February 28, 2000, the miner filed an appeal with the Board. On April 24, 2000, employer filed a motion requesting that the Board dismiss the miner's appeal based upon his failure to timely file a Petition for Review and Brief. By Order dated May 9, 2000, the Board ordered the miner to show cause, within ten days, why his appeal should not be dismissed for failure to comply with the requirements as to the timely filing of his Petition for Review and Brief. *Clonch v. Southern Ohio Coal Co.*, BRB No. 00-0567 BLA (May 9, 2000) (Order) (unpublished). In response, the miner filed a motion requesting that the Board voluntarily dismiss his appeal. Director's Exhibit 52. By Order dated June 1, 2000, the Board granted the miner's motion and dismissed his appeal. *Clonch v. Southern Ohio Coal Co.*, BRB No. 00-0567 BLA (June 1, 2000) (Order) (unpublished).

The miner subsequently submitted additional evidence. See Director's Exhibit 55. By letter dated November 13, 2000, the district director advised the miner that he considered his submission to be a request for modification. Director's Exhibit 56. In a Proposed Decision and Order dated December 18, 2000, the district director denied the miner's request for modification. Director's Exhibit 57.

On January 16, 2001, the miner filed a second request for modification. Director's Exhibit 58. The district director denied the miner's request for modification March 20, 2001. Director's Exhibit 65. On April 6, 2001, the miner requested that his case be forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 66. However, before his case could be transferred to the Office of Administrative Law Judges, the miner died on April 19, 2001. See Director's Exhibit 3A.

Claimant filed a survivor's claim on August 27, 2001. Director's Exhibit 1A. By letter dated September 18, 2001, the district director advised claimant that the district director would also conduct a "modification review on [the miner's] claim." Director's Exhibit 71. In a Proposed Decision and Order dated November 13, 2002, the district director denied the request for modification in the miner's claim. Director's Exhibit 72. In a separate Proposed Decision and Order dated November 13, 2002, the same district director denied benefits in the survivor's claim. Director's Exhibit 9A.

In regard to the request for modification in the miner's claim, Administrative Law Judge Joseph E. Kane (the administrative law judge) found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied the request for modification filed in the miner's claim. The administrative law judge further found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied benefits in the survivor's claim. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was

insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Claimant also contends that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in denying the request for modification filed in the miner's claim. Modification may be based upon a change in conditions.<sup>3</sup> The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an 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 at least one element 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). In the prior decision, Judge Mosser denied benefits because he found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 50.

An administrative law judge, in considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), should initially address whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See Nataloni, supra; Kovac, supra*. If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000).<sup>4</sup> The administrative law judge would next be required to address whether all of the evidence submitted since the denial of the

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<sup>3</sup> Modification may also be based upon a mistake in a determination of fact. *See* 20 C.F.R. §725.310 (2000). The administrative law judge found that no mistake in fact was alleged or appeared from the record. Decision and Order at 9. Because no party challenges the administrative law judge's determination that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> 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.

previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim.

The relevant issue before the administrative law judge was whether the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Mosser's denial of claimant's 1994 duplicate claim) was sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). In order to establish a material change in conditions, the newly submitted evidence must support a finding of total disability.<sup>5</sup> Thus, in order to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Mosser's denial of the miner's 1994 duplicate claim) must support a finding of total disability pursuant to 20 C.F.R. §718.204(b).

The administrative law judge found that the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Mosser's denial of benefits) was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii). Decision and Order at 6-7. Inasmuch as no party challenges these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, because there is no new evidence of record indicating that the miner suffered from cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Claimant argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that the opinions of

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<sup>5</sup> The miner's 1981 and 1989 claims were denied because the district director found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis. Director's Exhibits 30, 31. In denying these claims, the district director did not clearly delineate whether the denials were based upon a finding that the evidence was insufficient to establish the existence of a totally disabling respiratory impairment, a finding that the evidence was insufficient to establish that the miner's totally disabling respiratory impairment was due to pneumoconiosis, or both. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of total disability. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). If the newly submitted evidence is insufficient to support a finding of total disability, a finding of total disability due to pneumoconiosis is necessarily precluded.

Drs. Pacht, Holley and Baker were insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 7-9.

Claimant contends that the administrative law judge erred in finding the opinions of Drs. Holley and Baker insufficient to establish total disability.<sup>6</sup> We reject claimant's contention that the administrative law judge erred in failing to accord greater weight to Dr. Holley's opinion based upon his status as the miner's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* In this case, the administrative law judge found that Dr. Holley, in finding that the miner was totally disabled, failed to differentiate between the miner's cardiac ailment and his pulmonary impairments. Decision and Order at 9; Director's Exhibit 55. Consequently, the administrative law judge found that Dr. Holley's opinion was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because no party challenges the administrative law judge's basis for finding Dr. Holley's opinion insufficient to support a finding of a totally disabling respiratory or pulmonary impairment, this finding is affirmed. *Skack, supra.*

Claimant also argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In a report dated December 18, 2000, Dr. Baker opined that the miner suffered from a moderate pulmonary impairment. Director's Exhibit 58. Dr. Baker also opined that the miner did not have the respiratory capacity to perform the work of a coal miner. *Id.* Dr. Baker explained that he based his finding of total respiratory disability on the results of the miner's December 13, 2000 pulmonary function study; specifically on the fact that the miner's FVC and FEV1 values were less than 60% of predicted. *Id.*

Although Dr. Baker noted that the miner's FEV1 and FVC values were less than 60% of predicted, the administrative law judge found that Dr. Baker failed to adequately explain how the medical evidence "reveal[ed] the gravity rating of the miner's

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<sup>6</sup> Because no party challenges the administrative law judge's finding that Dr. Pacht's opinion is insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), this finding is affirmed. *Skrack, supra.*

impairment.”<sup>7</sup> Decision and Order at 9. We hold that the administrative law judge acted within his discretion in according less weight to Dr. Baker’s opinion because the doctor failed to explain the basis for his conclusion that miner suffered from a moderate pulmonary impairment that would render him unable to perform his coal mine employment.<sup>8</sup> See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge’s finding that the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Mosser’s denial of claimant’s 1994 duplicate claim) is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge’s finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

In regard to the survivor’s claim, claimant also contends that the evidence supports a finding that the miner’s pneumoconiosis contributed to his death. Claimant’s statement neither raises any substantive issue nor identifies any specific error on the part of the administrative law judge in determining that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Moreover, the administrative law judge’s finding is supported by substantial evidence.<sup>9</sup> Consequently, the administrative law

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<sup>7</sup> The administrative law judge also noted that the pulmonary function study results upon which Dr. Baker relied are non-qualifying. Decision and Order at 8.

<sup>8</sup> Claimant asserts that a review of a table relevant to a categorization of pulmonary impairment from the *American Medical Association’s Guide to Evaluation of Permanent Impairment* reflects that Dr. Baker was correct in finding that the miner’s pulmonary function study results supported a finding of a moderate pulmonary impairment. Claimant’s Brief at 14. The Board’s review authority does not permit consideration of evidence not properly submitted into the record before the administrative law judge. See *Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979). If claimant believes that this evidence will support his claim for benefits, then he may file a request for modification with the district director pursuant to 20 C.F.R. §725.310 (2000).

<sup>9</sup> Dr. Newbold completed the miner’s death certificate. Dr. Newbold attributed the miner’s death to cardiac arrest due to atherosclerotic cardiac disease. Director’s Exhibit 3A. There is no other medical evidence of record that addresses the cause of the miner’s death.

judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) is affirmed.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I concur.

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ROY P. SMITH  
Administrative Appeals Judge

I concur in the result only.

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REGINA C. McGRANERY  
Administrative Appeals Judge