

BRB No. 03-0593 BLA

BERNICE MOSER	)	
(Widow of CARL R. MOSER)	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 02/27/2004
v.	)	
	)	
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.

Bernice Moser, Port Carbon, Pennsylvania, *pro se*.

Helen H. Cox (Howard M. Radzely, 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order (2002-BLA-00191 and 2002-BLA-00192) of Administrative Law Judge Janice K. Bullard denying modification and 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).<sup>2</sup> Considering entitlement in both the miner's and survivor's

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<sup>1</sup> Claimant's is Bernice Moser, widow of the miner, Carl R. Moser.

<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal

claims pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the instant claims were requests for modification.<sup>3</sup> Decision and Order at 4, 10. The administrative law judge noted the proper standard and found that claimant failed to establish, in either claim, 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 or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), 718.205. Decision and Order at 4-14. 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).

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

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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.

<sup>3</sup>The miner, Carl R. Moser, filed his claim for benefits on February 10, 1993, which was finally denied by the district director on November 15, 1993. Director's Exhibits 1, 19. The miner requested a hearing before the Office of Administrative Law Judges on November 24, 1993. Director's Exhibit 20. The miner subsequently died on March 30, 1994 and claimant filed a survivor's claim on June 22, 1994, which was finally denied by the district director on April 25, 1997. Director's Exhibits 23, 28, 40, 50, 56. Claimant subsequently requested modification in both claims on December 9, 1997, which was finally denied on December 21, 2000. Director's Exhibits 57, 58, 73, 79, 80, 82. Claimant again requested modification, the subject of the instant appeal, on August 13, 2001. Director's Exhibit 84.

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).<sup>4</sup>

In considering 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. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). 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).

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.<sup>5</sup> The administrative law judge, in the instant case, rationally determined that

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<sup>4</sup>This 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.

<sup>5</sup>We note claimant's lack of representation by counsel during the proceedings before the administrative law judge. Claimant was specifically informed of her right to have counsel at no charge to her and the issues involved in the case. She was also allowed to testify and

the evidence of record was insufficient to establish total disability or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), 718.205 and therefore insufficient to establish modification. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Director's Exhibits 50, 56, 73, 79. The administrative law judge correctly noted that no new evidence was submitted and reviewed the relevant evidence of record in the prior decision in determining if a mistake in a determination of fact was established and properly concluded that the finding of no entitlement was correct.<sup>6</sup> Decision and Order at 4-9; *Keating*, 71 F.3d 1118; *Nataloni*, 17 BLR 1-82; *Kuchwara*, 7 BLR 1-167.

In determining if claimant established a basis for modification in the miner's claim, Decision and Order at 6-8; Director's Exhibits 8, 10, 18, 33, 49, the administrative law judge rationally determined that the qualifying<sup>7</sup> pulmonary function study dated September 14, 1993, conducted by Dr. Mathur, was entitled to no probative value as it was invalidated by Dr. Sahillioglu, for inconsistent effort, and by Dr. Spagnolo, due to excessive variation in the trials noted on tracings, since these physicians possessed superior credentials.<sup>8</sup> Decision and Order at 7; Director's Exhibits 18, 33, 49; *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). The remaining pulmonary function study and blood gas study were non-qualifying and thus insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(i)-(ii).<sup>9</sup> *Keating*, 71 F.3d 1118.

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present evidence. Hearing Transcript at 4-14. Consequently, the hearing before the administrative law judge was properly adjudicated. See 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-703 (1985).

<sup>6</sup>Based upon the circumstances of the instant case, modification cannot be established based on a change in conditions. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

<sup>7</sup>A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2) (i), (ii).

<sup>8</sup>The record indicates that Dr. Sahillioglu is Board-eligible in internal medicine and pulmonary disease. Director's Exhibit 18. Dr. Spagnolo is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 49. Dr. Mathur's qualifications are not in the record.

<sup>9</sup>The administrative law judge correctly concluded that the record did not contain any

With respect to Section 718.204(b)(2)(iv), the administrative law judge considered the entirety of the relevant medical opinion evidence of record, *i.e.*, the opinions of Drs. Mathur, Ahluwalia, Spagnolo and Naeye. Decision and Order at 8-10; Director's Exhibits 9, 18, 31, 32, 34, 35, 39, 44. Whereas Dr. Mathur opined that the miner had a moderately severe impairment of pulmonary function which disabled him, Director's Exhibits 18, 39, Drs. Ahluwalia, Spagnolo and Naeye opined that the miner's pulmonary impairment was so mild that it would not prevent the miner from doing hard physical work in the coal mining industry. Director's Exhibits 9, 31, 32, 34, 35, 44. The administrative law judge permissibly accorded determinative weight to the opinions of Drs. Ahluwalia, Spagnolo and Naeye over the contrary opinion of Dr. Mathur because she found these opinions are more detailed and well documented. *See Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry*, 9 BLR 1-1; *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, 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 8-10; Director's Exhibits 9, 18, 31, 32, 34, 35, 39, 44. Further, although Dr. Mathur 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 medical evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv) and therefore insufficient to establish modification pursuant to Section 725.310 (2000). *Keating*, 71 F.3d 1118; *Gee*, 9 BLR 1-4.

With respect to the survivor's claim, the relevant evidence of record concerning the cause of death consists of four medical opinions, the autopsy report and the death certificate. Dr. Naeye opined that the miner's death was due to sudden cardiac arrhythmia due to severe

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evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 8.

arteriosclerotic artery disease and the miner's coal workers' pneumoconiosis was too mild to have hastened his death. Director's Exhibit 31. Dr. Bindie, who performed the autopsy, stated that the cause of death was atherosclerotic coronary heart disease and complications thereof and the physician noted the existence of coal workers' pneumoconiosis but did not relate it to the cause of death. Director's Exhibit 30. Dr. Simelaro opined that because of the miner's pneumoconiosis, the lung could not fully oxygenate itself and that this complicated or caused the miner's acute coronary artery disease. Director's Exhibit 61. Dr. Spagnolo opined that pneumoconiosis did not cause a significant lung impairment or death and stated that the miner's death was due to severe coronary artery disease and a sudden cardiac arrhythmia resulting in cardiac arrest. Director's Exhibit 34. The death certificate, signed by Deputy Coroner John R. Barley, Sr., listed the cause of death as cardiac arrhythmia with cardio-respiratory arrest and atherosclerotic coronary heart disease with pneumoconiosis listed as a significant condition contributing to death. Director's Exhibit 23. Dr. Mathur, the miner's treating physician, opined that the miner had pulmonary anthracosilicosis during his lifetime which resulted in moderately severe impairment of pulmonary function which disabled him and was a significant substantial contributing factor in his death. Director's Exhibits 18, 39.

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. Naeye than to the medical opinions of Drs. Mathur and Simelaro, as the physician possessed superior credentials, offered a detailed, thorough and well-reasoned opinion based upon a review of the miner's autopsy results and actual autopsy slides and as his opinion was consistent and supported by the opinions of Drs. Bindie and Spagnolo. *See Balsavage*, 295 F.3d 390; *Mancia*, 130 F.3d 579; *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 concluded that the autopsy report and death certificate were insufficient to establish claimant's burden of proof as the deputy coroner only reviewed the autopsy report and this report did not indicate that pneumoconiosis contributed to the miner's death. *See Balsavage*, 295 F.3d 390; *Mancia*, 130 F.3d 579; *Lango*, 104 F.3d 573; *Evosevich*, 789 F.2d 1021; *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 12.

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; *Trent*, 11 BLR 1-26; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). 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 and survivor's claims as they are supported by substantial evidence and are in accordance with law.<sup>10</sup> *See Keating*, 71 F.3d 1118; *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26.

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<sup>10</sup>The 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 modification and benefits in the miner's and survivor's claims is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge