

BRB No. 02-0862 BLA

MARY D. RAY)
(Widow of WALTER HOLLIS RAY))
)
 Claimant-Petitioner)
 v.) DATE ISSUED:
07/23/2003)
FIVE OF US COAL COMPANY)
d/b/a LIBERTY COAL COMPANY)
)
 and)
)
SECURITY INSURANCE COMPANY OF)
HARTFORD)
)
)
 Employer/Carrier-)
 Respondents)
)
DIRECTOR, OFFICE OF WORKERS=)
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order B Denial of Benefits of Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

Mary D. Ray, Pikeville, Kentucky, *pro se*.¹

Lois A. Kitts, (Baird & Baird, P. S. C.), Pikeville, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judges, HALL and GABAUER,
Administrative Appeals Judges.

¹ Susie Davis, a benefits counselor with the Kentucky Black Lung Association of Pikeville, Kentucky, acting on behalf of claimant, filed an appeal of the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant², without the assistance of counsel, appeals the Decision and Order B Denial of Benefits (00-BLA-1057) of Administrative Law Judge Rudolf L. Jansen (the administrative law judge) on a request for modification of a miner'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).³ The administrative law judge found the evidence of record was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. ' 718.204(b), (c).⁴ Accordingly, the administrative law judge found that the evidence failed to establish a change in conditions and he found that there was no mistake in any determination of fact pursuant to 20 C.F.R. ' 725.310(2000). Thereby, he

²Claimant is Mary D. Ray, surviving spouse of the miner, Walter Hollis Ray.

³The 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 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.

⁴The provision pertaining to total disability, previously set out at 20 C.F.R. ' 718.204(c) is now found at 20 C.F.R. ' 718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. ' 718.204(b), is now found at 20 C.F.R. ' 718.204(c).

denied the request for modification and the claim.

The relevant procedural history of this miner=s claim is as follows⁵: The miner filed an application for benefits with the Department of Labor (DOL) on November 15, 1992. Director=s Exhibit 1. The district director issued an Initial Finding on April 26, 1994, awarding interim benefits commencing November, 1993. Director=s Exhibit 33. This determination was reaffirmed in an Initial Determination dated August 23, 1994. Director=s Exhibit 35. Following a hearing, Administrative Law Judge Frederick D. Neusner issued a Decision and Order dated August 31, 1995, wherein he denied benefits on the basis that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(2000). Director=s Exhibit 75. Following the miner=s appeal, the Board affirmed Judge Neusner=s denial of benefits. *Ray v. Five of Us Coal Co.*, BRB No. 95-2194 BLA (Feb. 28, 1996)(unpub.). Director=s Exhibit 82. On August 8, 1996, following the miner=s death, the district director denied claimant=s timely filed request for modification of the miner=s claim. Director=s Exhibit 85. After a second hearing, Administrative Law Judge Robert L. Hillyard denied benefits in a Decision and Order dated January 26, 2000 because, while he found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(2000), he further found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(2000). Director=s Exhibit 122. Claimant filed a second request for modification with DOL dated July 12, 2000. Director=s Exhibit 129. On August 30, 2002, the administrative law judge denied modification on the basis that the evidence did not establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(b), (c), and thereby found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310(2000). Claimant then filed the instant appeal with the Board, without the assistance of counsel.

⁵There was, additionally, a survivor=s claim filed by claimant. The award in the survivor=s claim is final. Director=s Exhibits 123, 127. Thus, the survivor=s claim is not at issue in the instant appeal.

On appeal, claimant generally challenges the administrative law judge's Decision and Order. Employer, in response to claimant's appeal, asserts that the administrative law judge's findings are supported by substantial evidence and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.⁶

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal 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 by 30 U.S.C. ' 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in this miner's claim, claimant must establish that the miner had pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. ' ' 718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

⁶ We affirm, as unchallenged on appeal and not adverse to claimant, the administrative law judge's findings that the miner established 27 years of qualifying coal mine employment, and that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge denied benefits, *inter alia*, because he found that all of the relevant evidence of record was insufficient to establish that the miner=s disability was due to pneumoconiosis pursuant to Section 718.204(c).⁷ Decision and Order at 15. Drs. Mettu, Guberman, Anderson and Sundaram opined that the miner was totally disabled due, at least in part, to pneumoconiosis. Director=s Exhibits 17, 18, 20, 31, 59, 89, 97, 116 at Claimant=s Exhibits 1 and 2. Drs. Branscomb, Naeye, Crouch, Broudy, Repsher and Fino all opined that any impairment the miner had during his lifetime was due to his extensive smoking history and not pneumoconiosis. Director=s Exhibits 32, 58, 69, 71, 99; Employer=s Exhibits 2-5.⁸ The administrative law judge found that Dr. Crouch is a professor of Pathology at Washington University in St. Louis. The record reflects that Drs. Broudy, Repsher and Fino are all Board-certified in Internal Medicine and Pulmonary Diseases, and that they are all B-readers. The record reflects that of the doctors who opined that the miner was totally disabled due, at least in part, to

⁷ Revised Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in ' 718.201, is a substantially contributing cause of the miner=s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause@ of the miner=s disability if it:

- (i) Has a material adverse effect on the miner=s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disability respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. ' 718.204(c)(1).

⁸ The record also contains opinions by Drs. Sens, Jones, Perper, DeLara, Dennis and Westerfield, which the administrative law judge correctly found addressed only the miner=s cause of death. The administrative law judge found that these opinions did not address the issues of whether the miner was totally disabled during his lifetime or whether the miner=s total disability, if present, was due, at least in part, to pneumoconiosis. Thus, these opinions are not relevant to the administrative law judge=s determination at 20 C.F.R. ' 718.204(c). Decision and Order at 14; Director=s Exhibits 12, 68, 100, 101, 116 at Claimant=s Exhibits 7, 8; Employer=s Exhibit 1.

pneumoconiosis, only Dr. Guberman=s credentials are contained in the record. Director=s Exhibit 116 at Claimant=s Exhibit 1.⁹ While the record reflects that Dr. Guberman possesses credentials comparable to those of Drs. Crouch, Broudy, Repsher and Fino, we nonetheless affirm the administrative law judge=s finding that the evidence is insufficient to establish total disability due to pneumoconiosis at Section 718.204(c). Specifically, despite the administrative law judge's failure to recognize Dr. Guberman=s comparable credentials, the preponderance of opinions by doctors with superior credentials supports the administrative law judge's finding that the miner=s respiratory disability did not rise out of coal mine employment. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Martinez v. Director, OWCP*, 10 BLR 1-24 (1987).¹⁰ We affirm, therefore, the

⁹ The record reflects that Dr. Guberman is Board-certified in Internal Medicine and Pulmonary Disease. Director=s Exhibit 116 at Claimant=s Exhibit 1.

¹⁰ We note that the instant claim involves a modification of a miner=s claim where the miner was deceased prior to the previous denial. Director=s Exhibit 122. The administrative law judge erred in reviewing the case to determine whether a change in conditions was established pursuant to Section 725.310(2000), as the miner is deceased, and therefore, claimant cannot establish modification by establishing a change in conditions. We hold, however, that this error is harmless in light of our affirmance of the administrative law judge=s denial based upon a consideration of all of the evidence of record pursuant to Section 718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276

administrative law judge=s determination that the evidence fails to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). 20 C.F.R. ' 718.204(c)(1); *see also Peabody Coal Co., v. Smith*, 127 F. 3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 806 F. 2d 818, 13 BLR 2-52 (6th Cir. 1989). As this finding precludes entitlement pursuant to the Part 718 regulations, we affirm the administrative law judge=s denial of benefits.¹¹ *See Trent; Perry*.

Accordingly, the administrative law judge=s Decision and Order B Denial of Benefits is affirmed.

(1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

¹¹We need not address the administrative law judge=s findings that the evidence fails to establish that the miner was totally disabled pursuant to Section 718.204(b), as it is rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge