

BRB No. 06-0664 BLA

CLAUDIA DAVIS)	
(Widow of LUKE DAVIS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JIM WALTERS RESOURCES,)	
INCORPORATED)	DATE ISSUED: 06/29/2007
)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (2004-BLA-5974 and 2004-BLA-6294) of Administrative Law Judge Janice K. Bullard denying benefits on a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

¹ Claimant is the widow of the miner, who died on January 15, 2003. Director's Exhibits 1, 7.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with twelve and one-half years of qualifying coal mine employment, based on a stipulation by the parties. The parties also stipulated to employer's designation as the responsible operator. Based on the date of filing, the administrative law judge considered entitlement in both the miner's and the survivor's claims pursuant to the regulations contained in 20 C.F.R. Part 718.² After noting that the miner's claim was a subsequent claim, the administrative law judge discussed the proper standard and found that the newly submitted evidence in the miner's claim was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge thus found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d).³ The administrative law judge further found, with respect to the survivor's claim, that although the existence of pneumoconiosis arising out of coal mine employment was established, entitlement was precluded since the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied in both the miner's and survivor's claims.

² The miner filed his initial claim for benefits on July 26, 1992, which was finally denied on July 13, 1994, by Administrative Law Judge Lawrence E. Gray. The Benefits Review Board affirmed this denial. *Davis v. Jim Walter Resources, Inc.*, BRB No. 95-1866 BLA (Feb. 27, 1995)(unpub.). The miner filed his second claim for benefits on January 27, 1997, which was finally denied on June 3, 1999, by Administrative Law Judge Gerald M. Tierney, based on his finding that total disability was not established. The miner filed his third claim, the subject of this appeal, on November 6, 2002, but died on January 15, 2003, while the claim was pending with the district director. The district director denied benefits on November 25, 2003. On December 8, 2003, the miner's widow requested a hearing before the Office of Administrative Law Judges on the miner's claim. Claimant's survivor's claim, filed on May 22, 2003, was denied by the district director on March 16, 2004. On April 1, 2004, claimant requested a hearing before the Office of Administrative Law Judges on the survivor's claim. Subsequently, the survivor's claim was consolidated with the miner's claim and both claims were referred for a hearing.

³ The administrative law judge's reference to establishing a "material" change in conditions, Decision and Order at 8, the language included in the prior regulations at 20 C.F.R. §725.309 (2000), is harmless error, in light of the administrative law judge's consideration of the revised regulations pursuant to 20 C.F.R. §725.309 and our affirmance of the administrative law judge's finding, *infra*, that the evidence is insufficient to establish total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

On appeal, claimant contends that the administrative law judge erred in excluding evidence submitted post-hearing. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to satisfy her burden of proof to establish total disability in the miner's claim and that the miner's death was due to pneumoconiosis in her survivor's claim pursuant to 20 C.F.R. §§718.204(b)(2) and 718.205(c).⁴ Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response to either appeal.⁵

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, 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.

Initially, we will address claimant's contention that the administrative law judge erred in declining to admit into the record in both the miner's and the survivor's claims the medical evidence of the miner's last illness. At the hearing, held on October 27, 2005, claimant's counsel stated that claimant was ill and unable to attend. Hearing Transcript at 5. Claimant's counsel requested the opportunity to submit the miner's final medical records and a post-hearing brief. *Id.* Employer indicated that it did not object to an extension of the 20-day rule, acknowledged that it was in possession of the records and stated that its consulting physicians had reviewed the records of the miner's last illness, "so it won't affect my case one way or the other." Hearing Transcript at 6. The administrative law judge provided 60 days post-hearing for claimant to obtain the records and a physician's review of the records and then provided an additional 30 days for

⁴ Claimant refers to the regulations contained in 20 C.F.R. §§410.410, 410.412, 410.418, 410.458. Claimant's Brief at 6-9. The regulations at 20 C.F.R. Part 718 are applicable to these claims. 20 C.F.R. §718.2.

⁵ As the administrative law judge's length of coal mine employment and responsible operator determinations are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4.

employer's rehabilitation of its doctors in light of any new report.⁶ Hearing Transcript at 9-10, 13-14. The post-hearing briefs were due on March 3, 2006. Hearing Transcript at 14. Claimant's counsel obtained the records post-hearing and stated that she "tardily" forwarded them to the Director post-hearing, and she also forwarded "excerpts" from the records of the miner's last illness to the administrative law judge with her post-hearing brief. Claimant's Brief at 12.

The administrative law judge, however, declined to admit the evidence submitted by claimant with her post-hearing brief. Decision and Order at 4. The administrative law judge stated:

Claimant submitted a post-hearing brief on this matter with a Certificate of Service attached and dated March 9, 2006. Also attached to the brief were eight evidentiary exhibits. On March 30, 2006, Employer objected to Claimant's submission of her post-hearing brief as untimely filed. Employer also objected to Claimant's evidentiary submissions as untimely. Employer asserted that it had not received Claimant's medical records until the post-hearing brief was filed. This would be approximately 133 days after the hearing, or 73 days after the deadline that I had established. Because Claimant failed to give Employer adequate time to review its medical evidence, I grant Employer's objection and exclude Claimant's medical evidence from the record. Accordingly, I decline to consider it in my decision. I overrule Employer's objection to the untimely filing of the brief, as I find no prejudice to Employer in the untimely admission of the brief to the record.

Decision and Order at 4.

On appeal, claimant argues that, contrary to the administrative law judge's finding, employer possessed the evidence in advance of the hearing and therefore would not be prejudiced by the inclusion of this evidence in the record. *Id.* at 4. Claimant specifically states that "[t]he justification cited by the [administrative law judge] for striking the

⁶ The administrative law judge implicitly found good cause established for claimant's failure to adhere to the twenty day rule and, further, employer did not object to the submission of the records post-hearing. 20 C.F.R. §725.456(b)(3); *see Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992); *Clark*, 12 BLR at 1-153; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985).

records was that the employer had not had an opportunity to review the records and formulate a response. This is factually incorrect.” Claimant’s Brief at 10.

Employer, in its response brief, states that copies of the records referenced by claimant were provided to her “well within the deadline established by the [administrative law judge] at the hearing; however, the claimant did not timely submit those records.” Employer’s Brief at 5. Employer thus avers that the administrative law judge properly excluded the medical records that were submitted late. *Id.*

We review the administrative law judge’s procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Based on the facts of this case, we hold that the administrative law judge acted within her discretion in declining to admit these documents into the record because she found that claimant did not submit them in a timely manner as ordered and agreed upon at the hearing. *Id.* Even though, employer acknowledges that it forwarded copies of the miner’s records to claimant’s counsel as discussed at the hearing, Employer’s Brief at 5, and may have reviewed this evidence pre-hearing, Hearing Transcript at 6, claimant’s post-hearing evidentiary submission was untimely, and no abuse in the administrative law judge’s ruling has been demonstrated. Consequently, we affirm the administrative law judge’s findings on this matter. 20 C.F.R. §725.456(b)(1), (b)(2); *see North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989); *Luketich v. Director, OWCP*, 8 BLR 1-477 (1986).

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 the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). In addition, the regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d). Because the basis for the denial of benefits in the miner’s prior claim was his failure to establish total disability due to pneumoconiosis, the relevant issue before the administrative law judge was whether the newly submitted evidence established a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. *Id.*

With regard to the miner’s claim, claimant asserts that the administrative law judge erred in failing to find that the pulmonary function study evidence established total

disability pursuant to 20 C.F.R. §718.204(b)(2)(i).⁷ Claimant's Brief at 6-8. The administrative law judge considered the newly submitted pulmonary function study dated December 27, 2002, which the administrative law judge correctly found "produced qualifying results."⁸ Decision and Order at 6; Miner's Claim Director's Exhibit 10. The administrative law judge permissibly determined, however, that the pulmonary function study was invalid based on the "uncontroverted" invalidations rendered by Drs. Michos and Fino, and thus the evidence was insufficient to establish total disability. Decision and Order at 6; Miner's Claim Director's Exhibit 10; Employer's Exhibit 2; *see Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), which we therefore affirm. In light of claimant's failure to establish total disability in the miner's claim, we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Thus, we affirm the administrative law judge's denial of benefits in the miner's claim.

In order to establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1365, 21 BLR 2-166, 2-176 (11th Cir. 1997).⁹

⁷ As the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv) are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6-8.

⁸ A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

⁹ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner's most recent coal mine employment occurred in

Claimant contends that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis. Claimant's Brief at 9-9A. This contention is without merit. Specifically, the administrative law judge noted that there is no evidence of record that supports a finding that the miner's death was due to pneumoconiosis. She observed that Dr. Hawkins evaluated the miner prior to his death and did not render an opinion regarding whether pneumoconiosis played a role in the miner's death. Decision and Order at 13; Miner's Claim Director's Exhibit 10. The administrative law judge accorded "substantial weight to the well-reasoned opinions of Dr. Fino and Dr. Friedlander" who explained that the miner's death was not caused, contributed to or hastened by pneumoconiosis. Decision and Order at 10; Employer's Exhibits 1, 2 Whether these opinions were adequately documented and reasoned was a credibility matter for the administrative law judge. See *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004). The administrative law judge therefore rationally determined that claimant did not prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), as she correctly found that the record does not contain any evidence in which a connection between the miner's simple pneumoconiosis and his death due to complications of prostate cancer is described.¹⁰ 20 C.F.R. §718.205(c); *Bradberry*, 117 F.3d at 1365, 21 BLR at 2-176; *Trumbo*, 17 BLR at 1-87; *Neeley*, 11 BLR at 1-86.

Because substantial evidence supports the administrative law judge's rational finding that the opinions of Drs. Hawkins, Fino and Friedlander did not establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c). Since claimant did not establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim, we must affirm the denial of benefits. See 20 C.F.R. §718.205(c)(1)-(5); see *Bradberry*, 117 F.3d at 1365, 21 BLR at 2-176.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

Alabama. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Miner's Claim Director's Exhibit 4.

¹⁰ Contrary to claimant's assertions, the presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis, which is not in the record. 20 C.F.R. §718.205(c)(3).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge