

BRB No. 07-0758 BLA

E.S. )  
(Widow of J.S.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
MOUNTAIN CLAY, INCORPORATED ) DATE ISSUED: 06/17/2008  
 )  
and )  
 )  
JAMES RIVER COAL COMPANY )  
 )  
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (04-BLA-6141 and 06-BLA-0054) of

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<sup>1</sup> Claimant is the widow of the miner, who died on January 23, 2003. Director's Exhibits 42, 49.

Administrative Law Judge Donald W. Mosser (the administrative law judge) denying benefits on a subsequent miner's claim and a survivor'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).<sup>2</sup> The administrative law judge credited the miner with at least ten years of coal mine employment<sup>3</sup> based on employer's concession, and adjudicated both claims pursuant to the regulations contained in 20 C.F.R Part 718.<sup>4</sup> The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).<sup>5</sup> Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.<sup>6</sup> Accordingly, the administrative law judge denied benefits in the

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<sup>2</sup> The miner filed his first claim on December 29, 1987. Director's Exhibit 1. On January 16, 1988, a claims examiner approved the miner's request to withdraw the claim. *Id.* The miner filed his second claim on June 11, 1993. Director's Exhibit 2. It was finally denied on March 27, 1996, because the evidence did not establish that the miner was totally disabled from a respiratory impairment. *Id.* The miner filed this claim on March 5, 2001. Director's Exhibit 4. While the claim was pending before the Office of Administrative Law Judges, the miner died. Director's Exhibits 42, 49. Claimant filed her survivor's claim on February 20, 2003. Director's Exhibit 42.

<sup>3</sup> The record indicates that the miner was employed in the coal mine industry in Kentucky. Director's Exhibits 2, 5, 7, 43. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> Administrative Law Judge Donald W. Mosser (the administrative law judge) noted that the miner had pneumoconiosis arising out of coal mine employment, based on his agreement with the decisions of the previous administrative law judge and the Board in the prior claim. Decision and Order at 10. The administrative law judge therefore stated that he would not revisit those issues. *Id.*

<sup>5</sup> The administrative law judge concluded that the issue of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) was moot in light of his finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b). Decision and Order at 11.

<sup>6</sup> Based on his finding that the new evidence did not establish that the miner was totally disabled from a respiratory impairment, the administrative law judge concluded that "the miner has not established an element of entitlement that was previously decided against him." Decision and Order at 11.

miner's claim. With regard to the survivor's claim, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant challenges the administrative law judge's findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv). Claimant also challenges the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.<sup>7</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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).

### **MINER'S CLAIM**

#### **A Change in an Applicable Condition of Entitlement**

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds 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.

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<sup>7</sup> Because the administrative law judge's findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§725.309(d). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). In this case, the miner’s prior claim was denied because the evidence did not establish that he had a totally disabling respiratory impairment. Director’s Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement. 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that the miner must establish at least one element of entitlement previously adjudicated against him).

#### **Section 718.204(b)(2)(i)**

Claimant initially contends that the administrative law judge erred in finding that the new pulmonary function study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). Specifically, claimant asserts that “this element was met in the miner’s claim because [Dr. Hussain]...found [the miner] to have a FEV1 at 2.04 liters as well as a MVV at 68% with a FEV1/FVC ratio of a mere 57%.” Claimant’s Brief at 4. The record contains three new pulmonary function studies dated June 22, 2001, July 11, 2001, and January 31, 2002. Dr. Hussain administered the June 22, 2001 pulmonary function study. Director’s Exhibit 14. All of the new pulmonary function studies yielded non-qualifying<sup>8</sup> values. Director’s Exhibits 14, 16, 39. Consequently, we reject claimant’s assertion that the June 22, 2001 pulmonary function study administered by Dr. Hussain supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that the new pulmonary function study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

#### **Section 718.204(b)(2)(iv)**

Claimant next contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). We disagree. The administrative law judge considered the reports of Drs. Baker, Hussain, Dahhan, and Rosenberg. Dr. Baker opined that the miner had a Class II impairment, and an occupational disability. Director’s Exhibit 16. Dr. Hussain opined that the miner had a moderate impairment, and did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director’s Exhibit 14. By contrast, Dr. Dahhan opined that from a respiratory standpoint, the miner retained the physiological capacity to continue his

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<sup>8</sup> A “qualifying” pulmonary function 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, Appendix B. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

previous coal mine work or a job of comparable physical demand. Director's Exhibit 39. Dr. Rosenberg opined that the miner did not have a disabling respiratory impairment. Employer's Exhibit 1. Dr. Oesterling opined that the miner had no lifetime disability due to the level of change produced by his coal workers' pneumoconiosis. Employer's Exhibit 2.

The administrative law judge discounted Dr. Hussain's disability opinion because Dr. Hussain had no knowledge of claimant's usual coal mine work. Decision and Order at 11. The administrative law judge then discounted Dr. Baker's disability opinion because Dr. Baker advised the miner to avoid further coal dust exposure. *Id.* Further, the administrative law judge determined that the opinions of Drs. Dahhan and Rosenberg were more consistent with the objective evidence of record. *Id.* Hence, the administrative law judge concluded that claimant failed to establish that the miner was totally disabled from a respiratory impairment.

Claimant asserts that the administrative law judge erred in discounting Dr. Baker's disability opinion. As noted above, Dr. Baker opined that:

[The miner] ha[d] a Class II, impairment with the FEV1 between 60% and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 16. Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would have prevented the miner from performing his usual coal mine work, Dr. Baker's finding that the miner had a Class II impairment was insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that the miner was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 16. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's disability opinion.

Claimant additionally asserts that the administrative law judge erred in discounting Dr. Hussain's disability opinion. As noted above, Dr. Hussain opined that the miner had a moderate impairment, and did not have the respiratory capacity to perform the work of

a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 14. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge should consider whether a physician who finds that a miner was not totally disabled had any knowledge of the exertional requirements of the miner's last coal mine employment before crediting that physician's opinion. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). In this case, the administrative law judge indicated that Dr. Hussain was unfamiliar with the miner's last coal mine work. The administrative law judge specifically stated:

The evidence indicates that the miner last worked as a heavy equipment operator and was required to sit for ten hours a day. (DX 1, 6). Dr. Hussain made no reference to the type of work the miner performed or how his moderate impairment prevented him from performing his last coal mine job.

Decision and Order at 11. Although Dr. Hussain attached an employment history to his report, the employment history only listed the miner's occupation as a "coal miner." Director's Exhibit 14. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Hussain's disability opinion because Dr. Hussain was unfamiliar with the miner's usual coal mine work.

Claimant raises no other challenge to the administrative law judge's weighing of the medical opinion evidence. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Further, in weighing together all of the medical evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge properly found that the opinions of Drs. Dahhan and Rosenberg were more consistent with the objective evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Thus, we affirm the administrative law judge's finding that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

## Section 725.309

In view of the foregoing, we affirm the administrative law judge's finding that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. We, therefore, affirm the administrative law judge's denial of benefits in the miner's claim. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-7 (2004).

## SURVIVOR'S CLAIM Section 718.205(c)

Finally, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>9</sup> *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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<sup>9</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

Claimant asserts that because the administrative law judge failed to consider Dr. Hussain's opinion that the miner suffered from a totally disabling pulmonary impairment caused by pneumoconiosis at least eighteen months before his death, substantial evidence does not support the administrative law judge's finding that the evidence was insufficient to establish that pneumoconiosis hastened the miner's death. Contrary to claimant's assertion, Dr. Hussain's disability causation opinion was not relevant evidence at 20 C.F.R. §718.205(c). *Compare* 20 C.F.R. §718.205(c) *with* 20 C.F.R. §718.204(c).

At Section 718.205(c), the administrative law judge stated that “[t]here is insufficient evidence in the record to establish that pneumoconiosis was a substantially contributing cause to the miner's death.” Decision and Order at 12. The record consists of the death certificate completed by Dr. Burki,<sup>10</sup> the autopsy report of Dr. O'Connor,<sup>11</sup> and the reports of Drs. Rosenberg, and Oesterling. In the death certificate, Dr. Burki listed cardiopulmonary collapse as the immediate cause of death. Director's Exhibit 49. Dr. Burki also listed end-stage lung carcinoma and poorly differentiated adenocarcinoma as underlying conditions leading to the immediate cause of the miner's death. *Id.* In the autopsy report, Dr. O'Connor diagnosed poorly differentiated adenocarcinoma of right lung, chronic obstructive pulmonary disease with mild centrilobular emphysema, and anthracosilicosis consistent with simple coal workers' pneumoconiosis, but he did not render an opinion regarding the cause of the miner's death. Director's Exhibit 50. Dr. Rosenberg opined that the miner's death was related to lung cancer, which was not caused, aggravated, or hastened by coal dust exposure. Employer's Exhibit 1. Dr. Oesterling opined that the miner's coal workers' pneumoconiosis did not appear to be a factor in his demise. Employer's Exhibit 2. Because none of the medical reports indicate that pneumoconiosis caused or hastened the miner's death in any way, we reject claimant's assertion that the administrative law judge should have found that the medical evidence established that pneumoconiosis hastened the miner's death. Further, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement in the survivor's claim, we affirm the

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<sup>10</sup> In a Discharge Summary of the University of Kentucky Hospital, Dr. Burki's final diagnosis was metastatic adenocarcinoma of the right lung. Director's Exhibit 51.

<sup>11</sup> Although Dr. Sears was listed as the gross pathologist/prosector, Dr. O'Connor “electronically signed out” the final anatomic diagnosis on the autopsy report. Director's Exhibit 50.

administrative law judge's denial of survivor's benefits under 20 C.F.R. Part 718. *See Trumbo*, 17 BLR at 1-88; *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge