

BRB No. 07-0901 BLA

D.S.)	
(Widow of R.S.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BOB & ROD COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	DATE ISSUED: 06/30/2008
)	
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 Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-06090/06091) of Administrative Law Judge Pamela Lakes Wood rendered on a miner's subsequent 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).¹ The administrative law judge credited the miner with sixteen and one half years of coal mine employment and adjudicated the claims pursuant to 20 C.F.R. Part 718. The administrative law judge found that the preponderance of the newly submitted medical evidence did not support a finding that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 12. Thus, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement since the denial of the miner's prior claim pursuant to 20 C.F.R. §725.309(d). *Id.* The administrative law judge further found that claimant failed 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 denied benefits in both claims.

On appeal, claimant argues that the administrative law judge erred in failing to find the evidence sufficient to establish that the miner was totally disabled prior to his death based on the medical opinion evidence at 718.204(b)(2)(iv).² Claimant also

¹ The miner initially filed a claim for benefits on April 22, 1980. Miner's Director's Exhibit 1. In his Decision and Order, Administrative Law Judge Daniel J. Roketenetz credited claimant with sixteen and one half years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). Judge Roketenetz denied benefits, however, because he found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204. The Board affirmed the denial of benefits. [*R.S.*] *v. Bob & Rod Coal Co.*, BRB No. 86-0370 BLA (Aug. 31, 1986) (unpub.). The miner took no further action until he filed a second claim on November 29, 2001. Miner's Director's Exhibit 3. The district director denied benefits because the miner did not establish any element of entitlement. Miner's Director's Exhibit 24. The miner requested a hearing, and the case was referred to the Office of Administrative Law Judges. After receiving notice that the miner had died on November 20, 2003, Administrative Law Judge Linda Chapman issued an Order of Remand returning the case to the district director for consolidation with the survivor's claim, filed on May 7, 2004 by claimant, the miner's surviving spouse. Widow's Director's Exhibit 2. The district director denied both claims. The administrative law judge held a hearing on March 29, 2006 in Abingdon, Virginia. Decision and Order at 3.

² In challenging the administrative law judge's finding on the issue of total disability, claimant alleges that the reports and opinions of Dr. Baker meet the criteria at 20 C.F.R. §718.204(c)(4). Claimant's Brief at 4. We note, however, that under the revised regulations, the pertinent regulation for establishing total disability is 20 C.F.R. §718.204(b)(2), while Section 718.204(c) is the regulation relevant to the issue of disability causation. *See* 20 C.F.R. §718.204(b), (c).

contends that the administrative law judge erred in failing to find the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 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).

The Miner's Claim

In order to establish entitlement to benefits in the miner's claim in this case, claimant was required to establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure 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)(*en banc*).

When 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. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because the miner's initial claim for benefits, filed on April 22, 1980, was denied for failure to establish a totally disabling respiratory or pulmonary impairment,

³ The parties do not challenge the administrative law judge's findings that the miner had sixteen and one half years of coal mine employment, that the miner had pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(2), (4), and 718.203(b), that the presumptions set forth in 20 C.F.R. §718.202(a)(3) are not available in the miner's claim, and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Accordingly, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

claimant was required to prove, based on the newly submitted evidence, that the deceased miner was totally disabled by a respiratory of pulmonary impairment.

Claimant asserts that because Dr. Baker stated in his December 5, 2001 report that the miner had a Class I respiratory impairment, and that the miner was 100% occupationally disabled under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*), Chapter 5, p. 106, the administrative law judge should have determined that total disability was established at Section 718.204(b)(2)(iv). Claimant's Brief at 4. Claimant also contends that in addressing the issue of total disability, the administrative law judge was required to compare the exertional requirements of the miner's usual coal mine work to the physicians' findings regarding the extent of any respiratory impairment. Claimant's Brief at 6, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant states:

It can be reasonably concluded that the miner's regular coal mining duties involved the miner being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the [miner's] condition against such duties, as well as the medical opinions of Dr. Baker, it is rational to conclude that the miner's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Wood made no mention of the [miner's] usual coal mine work in conjunction with Dr. Baker's opinions of disability.

Claimant's Brief at 6, 7. We reject claimant's arguments as they are without merit.

Under Section 718.204(b)(2)(iv), the administrative law judge considered Dr. Baker's opinion and the opinions in which Drs. Hussain, Dahhan and Rosenberg indicated that the miner was not totally disabled.⁵ Decision and Order at 12. Contrary to

⁵ Dr. Hussain examined the miner on January 25, 2002, and opined that the miner had no impairment. Miner's Director's Exhibit 10. Dr. Dahhan examined the miner on August 25, 2003 and noted that the objective studies measuring the miner's respiratory and pulmonary condition were normal. Dr. Dahhan concluded that there was no evidence of respiratory or pulmonary impairment/disability. Miner's Director's Exhibit 49. Dr. Rosenberg performed a record review and prepared a report on November 7, 2005. Employer's Exhibit 2. He opined that, based upon the normal results of the miner's objective studies, the miner retained the respiratory capacity to perform his previous coal mine job. *Id.*

claimant's assertion, Dr. Baker's finding that the miner had a Class I respiratory impairment does not establish total disability, as the A.M.A. *Guides* indicate that a Class I impairment equates to a finding of zero impairment of the whole person, and does not indicate any respiratory disability. A.M.A., *Guides*, Chapter 5, p. 106. Furthermore, as noted by the administrative law judge, while Dr. Baker stated that claimant was 100% percent disabled for work, he specifically reached that conclusion based on his finding that claimant "should limit further exposure" to coal dust. Decision and Order at 10, 12; Miner's Director's Exhibit 9. The administrative law judge properly concluded that "a finding that a miner should avoid occupational exposure is more in the nature of a medical recommendation based upon health concerns than a statement that a miner lacks the pulmonary or respiratory capacity to perform the required work." Decision and Order at 12; see *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Thus, we conclude that the administrative law judge properly determined that Dr. Baker's opinion was insufficient to satisfy claimant's burden of establishing that the miner was totally disabled pursuant to Section 718.204(b)(2)(iv).

Moreover, contrary to claimant's assertion, the administrative law judge discussed the miner's last coal mine job as a bulldozer operator and found that it required "significant effort." Decision and Order at 9, 12. In light of the fact that the remaining physicians of record determined that the miner did not have a respiratory or pulmonary impairment, however, the administrative law judge rationally concluded that there was no evidence to support a conclusion that the miner was incapable, from a respiratory or pulmonary standpoint, of performing his last coal mine job prior to his death.⁶ See *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9-10 (1988); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219, 1-1221 (1984); Decision and Order at 9, 12. Thus, we affirm her finding that total disability was not established pursuant to Section 718.204(b)(2)(iv).⁷ Because

⁶ After considering the description of the miner's coal mine work and the miner's testimony, the administrative law judge found that "[w]hile any coal mine job undoubtedly requires significant effort, it has not been shown that the [m]iner's coal mine employment was particularly strenuous or heavy" or that he "was incapable of performing even heavy labor." Decision and Order at 12; Miner's Director's Exhibits 1, 6, 51.

⁷ Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant also asserts that Dr. Baker's opinion is sufficient to "invoke a presumption of total disability." Claimant's Brief at 5. Claimant's reliance on *Meadows* is misplaced. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. In addition, the miner was not entitled to a presumption of total disability under 20 C.F.R. Part 718, as

the administrative law judge's determination that the miner was not totally disabled is supported by substantial evidence, we further affirm her finding that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d). *White*, 23 BLR at 1-3. Accordingly, we affirm the denial of benefits in the miner's claim.

The Survivor's Claim

Regarding the administrative law judge's consideration of the survivor's claim under Section 718.205(c), claimant generally asserts that the record contains "extensive medical documentation" showing that pneumoconiosis hastened the miner's death, and notes that Dr. Baker diagnosed coal workers' pneumoconiosis and a pulmonary impairment. Claimant's Brief at 3. Claimant's contentions are without merit.

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in this claim, filed after January 1, 1982, claimant was required to establish that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1; 718.202; 718.203; 718.205(c); 718.304. *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). 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)(2), (c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Pursuant to Section 718.205(c), the administrative law judge considered the autopsy report by Dr. Gale, the reports of Drs. Baker, Branscomb and Rosenberg, and the miner's death certificate. Decision and Order at 15-20; Miner's Director's Exhibit 9; Widow's Director's Exhibits 6, 7; Employer's Exhibits 1, 2. The administrative law judge accurately determined that although Dr. Gale included a diagnosis of simple coal workers' pneumoconiosis in his autopsy report, he attributed the cause of the miner's death to severe underlying atherosclerotic heart disease and did not mention any possible contribution by pneumoconiosis. Decision and Order at 20; Widow's Director's Exhibit 7. The administrative law judge noted that Dr. Baker rendered his opinion before the miner died and, therefore, did not consider the autopsy report and did not opine as to the cause of the miner's death. Decision and Order at 17; Miner's Director's Exhibit 9. The administrative law judge further found that Drs. Branscomb and Rosenberg attributed the

the record contains no evidence of complicated pneumoconiosis and the miner's subsequent claim was filed after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e).

miner's death to his coronary artery disease and opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. Decision and Order at 20; Employer's Exhibits 1, 2. Lastly, the administrative law judge determined correctly that the death certificate listed myocardial infarction due to coronary artery disease as the cause of the miner's death, without referencing any other factors or conditions. Decision and Order at 20; Widow's Director's Exhibit 6. Because the administrative law judge properly concluded that there is no evidence of record indicating that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.205(c) and her denial of benefits in the survivors' claim. 20 C.F.R. §718.205(c); *Griffith*, 49 F.3d at 186, 19 BLR at 2-116.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on both claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge